Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners,

v.

GEORGE W. BUSH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

In *Rasul v. Bush*, 542 U.S. 466 (2004), this Court held that aliens imprisoned at the Guantánamo Bay Naval Station ("Guantánamo") could challenge their captivity by *habeas corpus*. In March 2005, two Guantánamo prisoners, Abu Bakker Qassim and Adel Abdu' al-Hakim ("Petitioners"), filed for *habeas*, alleging that they were not enemy combatants.

The government ("Executive" or "Respondents") obtained a stay of the *habeas* action without informing the district court that they had already determined that Petitioners are not "enemy combatants." Petitioners' counsel asked the Executive whether it contended that the Petitioners are a threat to the security of the United States, but the Executive remained silent. Petitioners' counsel did not learn of this determination until July, 2005, when they were first permitted to visit the Petitioners in isolation cells at Guantánamo. Counsel then moved the district court for Petitioners' release. Belatedly conceding that the Petitioners are not "enemy combatants," the Executive asserted "the Executive's necessary power to wind up wartime detentions in an orderly fashion." On December 22, 2005, the district court correctly rejected this rationale, finding that "the detention of these petitioners has now become indefinite" and "is unlawful." However, the district court denied relief to the Petitioners, concluding that "a federal court has no relief to offer" people in Petitioners' limbo because of "obstacles [that] are constitutional and involve the separation of powers doctrine."

The Question Presented is whether the "the separation of powers doctrine" deprives a federal court of all power to grant relief to persons indefinitely and unlawfully imprisoned at Guantánamo.

PARTIES TO THE PROCEEDINGS

The Petitioners here and below are Abu Bakker Qassim and Adel Abdu' al-Hakim, refugees from the Xingjiang Uighur Autonomous Region of Western China, who are, and for more than three and one half years have been, imprisoned at Guantánamo Bay, Cuba.

The Respondents here and below are George W. Bush, President of the United States, Donald Rumsfeld, Secretary of the Department of Defense, Brigadier General Jay Hood, Commander, Joint Task Force GTMO, Guantánamo Bay, Cuba, Army Col. Brice Gyurisko, Commander, Joint Detention Operations Group, Guantánamo Bay, Cuba.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the district court (Pet. App. 1a-11a), ruling that the imprisonment of the Petitioners in Guantánamo Bay by the Executive branch "is unlawful," but that "a federal court has no relief to offer" Petitioners, is unpublished.

JURISDICTION

The district court's decision and final order were entered on December 22, 2005. Pet. App. 1a-11a. The notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed on December 23, 2005, and was docketed in the court of appeals on December 28, 2005, as D.C. Circuit No. 05-5477. The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

RELEVANT PROVISIONS OF LAW

The following constitutional and statutory provisions are relevant to this petition:

U.S. Const. art. II, § 1, cl. 1 states, in pertinent part:

> The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 1, cl. 7 states:

> Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: -- "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. Const. art. II, § 3 states, in pertinent part:

[The President] shall take Care that the Laws be faithfully executed . . . .

U.S. Const. art. III, § 1 states, in pertinent part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution; the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party . . . .

28 U.S.C. § 2241 states, in pertinent part:

(a) Writs of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

. . . .

(c) The writ of *habeas corpus* shall not extend to a prisoner unless --

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

28 U.S.C. § 2243 states, in pertinent part:

> The [*habeas*] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

A. The Underlying Facts

Petitioners are Uighurs, members of a Muslim minority who inhabit the Xingjiang Autonomous Region of far-western Communist China. The Uighurs have suffered under brutal communist rule.

On November 13, 2001, the President issued an order for the use of military force. *See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FR 57833 (November 13, 2001).

In approximately December, 2001, Petitioners, while present in Pakistan, were sold by bounty hunters to United States forces and transported to a military facility at Kandahar, Afghanistan. Petitioners were held in prison in Afghanistan until approximately June, 2002. Pet. App. 1a. During his imprisonment there, Petitioner Hakim was advised that United States forces knew that he had been taken "by mistake."

Since June, 2002, Petitioners have been held in prisons at Guantánamo Bay. Pet. App. 1a. They were never charged with any wrongdoing nor designated for any military tribunal.

B. The Combatant Status Review Tribunals

On June 29, 2004, this Court issued its ruling in *Rasul v. Bush*, 542 U.S. 466 (2004). Nine days later, the Department of

Defense established "Combatant Status Review Tribunals" ("CSRTs"). "Enemy combatant" was defined as:

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Order Establishing Combatant Status Review Tribunals, issued by Deputy Secretary of Defense Paul Wolfowitz (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf ("Wolfowitz Order").

The Wolfowitz Order provides: "Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session whether the detainee is properly detained as an enemy combatant." Wolfowitz Order, ¶ g(12). It continues:

> *Non-Enemy Combatant Determination.* If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with the domestic and international obligations and the foreign policy of the United States."

Wolfowitz Order, ¶ i.[1]

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[1] Following the hearing, the presiding officer must mark the following sentence appropriately: "The Tribunal has determined that he (is) (is not) designated as an enemy combatant . . . ."

C. The Petitioners' CSRT Hearings

Sometime in late 2004 or early 2005, Respondents conducted separate CSRT hearings for each Petitioner. Pet. App. 1a-2a. Respondents kept the results secret until July 29, 2005, when they conceded that "the CSRTs determined petitioners should no longer be classified as enemy combatants on March 26, 2005." In later papers, the Executive tried to suggest from the finding that Petitioners should no longer be *classified* as combatants that they once *were* combatants. The district court rightly deemed this "Kafkaesque." Pet. App. 5a. As is plain from the definition of "enemy combatant" in the Wolfowitz Order, the finding can only mean that the Petitioners *never* were enemy combatants. The Executive offered the district court no evidence to the contrary. Pet. App. 4a-6a.

D. The District Court Proceedings

On March 10, 2005, the petitions for writs of *habeas corpus* were filed. Pet. App. 2a. Four days later, the Executive moved to stay the case until appeals involving other Guantánamo prisoners were resolved by the court of appeals. *Id.*[2] Petitioners' counsel asked the Executive whether it alleged that Petitioners were enemy combatants. *Id.* The Executive never responded, and on March 29, 2005 advised the district court that "[a] factual record for a petitioner in a Guantánamo Bay detainee case

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Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba, issued by the Secretary of the Navy Gordon England (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[2] The tactics employed by the Executive, along with the uniform refusal, after February, 2005, of the judges of the district court to adhere to *Rasul*'s plain mandate to "consider the merits" of the petitions, *see* 542 U.S. at 485 and discussion, *infra*, has prolonged the Executive's unlawful imprisonment in this case and in hundreds of other Guantánamo cases.

typically has consisted of the record of proceedings before the Combatant Status Review Tribunal that confirmed petitioner's status as an enemy combatant properly subject to detention." When it filed that brief, the Executive already had determined that the Petitioners were not enemy combatants. Pet. App. 1a-2a.

By this point, the Petitioners had passed the fourth anniversary of imprisonment by United States forces (in Kandahar and Guantánamo). Pet. App. 4a. They were permitted no visitors, no contact with the outside world, no newspapers or news magazines. They had no word from their wives, parents, or children.

Misled as to Petitioners' combatant status, the district court granted the Executive's stay motion in May, 2005. Pet. App. 2a. That same month, each Petitioner was advised in Guantánamo that he had been determined not to be an enemy combatant. *Id.* at 1a-2a. No one told counsel or the district court, however, and Petitioners were unable to contact anyone. *Id.* at 2a.[3]

On July 13 and 14, 2005, counsel first met Petitioners in separate meetings in small isolation cells at Guantánamo Bay, where Petitioners were chained to the floor. In these meetings, counsel for the first time learned of the noncombatant findings. Pet. App. 2a-3a. On return from the base, Petitioners' counsel filed an Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners, and the Court scheduled an August 1, 2005 hearing. *Id.* at 3a. In a brief filed July 29, 2005, the Executive for the first time admitted that

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[3] Counsel were not admitted to the base until screened by the FBI, although they repeatedly requested access to the Petitioners. In May, 2005, Petitioners wrote letters advising that they were "innocent," but those letters were not delivered to counsel until September, 2005.

Petitioners were not enemy combatants, and that CSRT proceedings had concluded on March 26. 2005.[4]

In mid-August of 2005, Petitioners, along with other prisoners found to be noncombatants, were hastily moved to "Camp Iguana," a slightly lower-security prison. Ten or fewer men have been imprisoned there ever since. The isolation is intense. "We are completely cut off from the outside world. If we continue to be held here, it is going to drive us all crazy," said Petitioner Qassim in November, 2005.

The Executive advised the district court that the men continued to be held because they could not be returned to Communist China, where they would be subject to torture. The district court was assured, both on the record and in chambers, that the Executive was attempting to arrange a resettlement of the men. In August, 2005, the court advised that it would permit the Executive some time to attempt to resolve the matter diplomatically. Pet. App. 3a.

No resettlement was arranged. In an effort to assist with this process, Petitioners moved for access to representatives of the United Nations High Commission for Human Rights ("UNHCR"). The motion was strenuously opposed and ultimately denied in December of 2005.

Petitioners urged the district court to order one of three remedies: (i) release of the men into the civilian population of Guantánamo Bay; (ii) under the doctrine of *Baker v. Sard*, discussed *infra*, production of the body of each Petitioner in court, for the district court then to order a parole of each

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[4] "Completion" of a CSRT happens long after the hearing, as it involves multiple levels of administrative review within the Department of Defense. *See generally* Wolfowitz Order.

Petitioner pursuant to conditions of release pending an ultimate resettlement by the Executive; or (iii) outright release.

On December 22, 2005, the district court denied the *habeas* petition, ruling correctly that the Executive's imprisonment of the Petitioners is unlawful, and incorrectly that the judicial branch is powerless to fashion a remedy against the lawless conduct of the Executive. Pet. App. 1a-12a.

E. Proceedings on Appeal

On December 23, 2005, Petitioners filed their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. The appeal was docketed on December 28, 2005. Accordingly, the case is "in the court[] of appeals" within the meaning of 28 U.S.C. § 1254. *See* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 2.4, at 75 (8th ed. 2002).[5]

REASONS FOR GRANTING THE PETITION

A federal court has ruled itself impotent to remedy imprisonment by the Executive in a case within its jurisdiction. The import and impact of this ruling are systemic and profound. Central to the design of the Constitution is the equipoise between

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[5] On January 12, 2006, Petitioners filed a motion to expedite the proceedings and resolution of the appeal. That motion does not obviate the need for this Court's intervention before judgment by the court of appeals. As discussed *infra*, the pure questions of law at issue here go to the core of the judicial power and of the obligations of the coordinate branches, and are of such profound importance as to require immediate review by this Court. Moreover, expedition by the court of appeals, even if granted, likely would not result in the swift resolution so urgently needed in this case. Indeed, although expedition was granted by the court of appeals in *Al Odah, Khaled A.F., et al. v. United States, et al.*, D.C. Circuit No. 05-5064, the appeal remains unresolved nearly a year after it was docketed.

a powerful executive branch and a judiciary able to check overreaching in discrete cases. That balance confers on the judicial branch not only the power, but the duty to remedy discrete instances of Executive lawlessness where, as here, they occur within its jurisdiction.

The district court's ruling that a *habeas* court may determine that a petitioner's imprisonment by the Executive is illegal but that it nonetheless has "no relief to offer" ignores the imperative of remedy in *habeas* cases -- particularly cases of imprisonment by the Executive -- and drains all meaning from this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004). The district court's failure to grant a remedy in this case is an abdication of its judicial function under 28 U.S.C. § 2243 and the Constitution. Its practical effect is to eliminate meaningful judicial review and to eviscerate one of the key checks on the Executive power built into the constitutional plan.

Liberty can never be secure when the judicial branch declares its impotence. Accordingly, the damage to the public is profound. The damage to the relations of the United States with foreign persons and nations is equally profound, for the ruling proclaims an Executive with unchecked power to seize innocents from around the globe, transport them to United States territory, and imprison them at its pleasure.

Because this petition poses the question of judicial duty under 28 U.S.C. § 2243 and the Constitution in its most grave and urgent context, certiorari should be granted *before* entry of judgment by the court of appeals. The legal issues are straightforward; the significance to the judicial and executive branches acute; and the normal appellate process would extend to absurdity a four-year imprisonment already adjudicated unlawful. This is that rare case in which the Court's immediate intervention is merited.

A. Certiorari Should Be Granted To Remedy the District Court's Intolerable Abdication of its Function under 28 U.S.C. § 2243 and the Constitution.

28 U.S.C. § 2243 mandates that the *habeas* court "dispose of the matter as law and justice require."[6] The district court correctly identified and posed the decisive issue presented by this record: "The question in this case is whether the law gives . . [a federal court] the power to do what . . . [it] believe[s] justice requires. The answer . . . is no." Pet. App. 6a.

The district court's conclusion that justice requires the Petitioners' release is manifestly correct. These men have now been imprisoned *seven times longer* than the presumptive maximum period of reasonable confinement recognized in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 125 S. Ct. 716 (2005), with no end in sight. Pet. App. 6a. The only distinctions between Petitioners' case and that of the unadmitted foreign nationals in *Martinez* are that (1) the foreign nationals in *Martinez* each had been convicted of serious crimes in the United States, whereas Petitioners have never even been

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[6] The relevant facts occurred, and the action below was brought, prosecuted, and decided prior to the enactment by Congress of The Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X of the Defense Appropriation Act, H.R. 2863, 109th Cong., 1st Sess. (the "Act"). The Act was signed into law by the President on December 30, 2005. Petitioners believe that the Act has no application to pending Guantánamo cases, including this case. *See Hamdan v. Rumsfeld*, No. 05-184, Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba, and their Family Members, in Support of Petitioner and in Support of Jurisdiction (filed January 6, 2006). Petitioners believe that, given the circumstances of this case, there are other reasons (in addition to those discussed in the cited amicus brief) why the Act does not apply here. Petitioners request the opportunity to brief this issue, should the Court deem it to be necessary to its decision whether to grant this petition.

charged with one; and (2) the foreign nationals in *Martinez* bore responsibility for their stateless plight, because they chose to come to the United States voluntarily, whereas Petitioners were transported involuntarily to Guantánamo by bounty hunters and the United States military.

The district court concluded that it was divested of the power to do what justice manifestly requires by an unspecified emanation from "the separation of powers doctrine." Pet. 7a-11a. Nowhere does the court cite any authority that such an emanation exists, and *Martinez* makes clear that it does not.

In *Martinez*, which involved Cubans who arrived in the United States as part of the Mariel boatlift, this Court approved release into the population of *aliens who had never been admitted to the United States*. Under the law then effective, such refugees were not lawful aliens, and they were not "admitted," but rather "paroled" into the United States.[7] (Refugees could later adjust their status to that of lawful permanent resident unless they fell within statutory exclusions.) The *Martinez* petitioners committed serious crimes in the United States, and were therefore excluded from admission. They were thus unlawful aliens who had never been admitted to the United States. The men were ordered deported, but because Cuba would not accept them, they were detained pursuant to statute. They brought *habeas corpus* petitions, and this Court ordered that they must be released, even though they had never been lawful resident aliens. *Martinez*, 543 U.S. at 727; *see also Zadvydas*, 533 U.S. at 699-700 (adjudicated criminal aliens entitled to release).

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[7] The Attorney General has discretion to "parole" into the territory of the United States an alien who has never been admitted. 8 C.F.R. § 212.5(a) (2004).

In sum, there is no "law" or "separation of powers" issue pursuant to which the judicial branch may withhold what it correctly determined "justice" requires: an end, after more than four years, of wrongful imprisonment, even if the only means of facilitating that end is parole into the continental United States pending a diplomatic resettlement abroad.

No one disputes that a *habeas* court has inherent power to order "parole" -- that is, release on conditions -- a power included within *habeas* jurisdiction itself. *See Mapp v. Reno*, 241 F. 3d 221, 226 (2d Cir. 2001) (parole for alien); *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969) ("When an action pending in a United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action *includes an inherent power* to grant relief *pendente lite*, to grant bail or release, pending determination of the merits.") (emphasis supplied); *Whitfield v. Hanges*, 222 F. 745, 756 (8th Cir. 1915) ("the court has ample power to admit the alien to bail or to take his own recognizance").[8] In the district court, the Petitioners requested that the court order the Executive to produce the bodies under 28 U.S.C. § 2243 and in court consider reasonable conditions for parole. There is no lawful reason why this remedy should not have been afforded upon the filing of the petition in March, 2005.

The federal judiciary "historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power, as well as to ensure an independent judiciary." *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 66 (1992). When the Executive has acted

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[8] *See Chick Yow v. United States*, 208 U.S. 8, 13 (1908) (ordering writ of *habeas corpus* for a petitioner denied entry in a case in which citizenship was disputed; prisoner ordered brought before judge for trial).

illegally -- i.e., beyond the scope of its constitutional powers, as has been adjudicated to be the case here -- it is the constitutional duty of the judiciary to order the Executive to stop and the duty of the Executive to obey the judicial order. *See United States v. Nixon*, 418 U.S. 683, 703-05 (1974). The district court simply abdicated that duty. There is no balance without a check, and the effect of this abdication is to throw the constitutional design into imbalance.

Judicial recognition of the duty of the Executive to comply with court orders in *habeas* cases dates at least to the Civil War period. *Ex parte Merryman*, 17 F. Cas. 144, 9 Am. Law Reg. 524 (C.C. Md. 1861). There, the Chief Justice, finding an imprisonment unlawful, ordered the President to end it, and further, to fulfill his constitutional obligation to execute the laws faithfully. *See* 17 F. Cas. at 148-153 (explaining that the President has the "duty to come in aid of the judicial authority" and that, in exercising the power of the office, "he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments"; that "[t]he government of the United States is one of delegated and limited powers; it derives it existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted"; and ordering the President, "in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced").

Correcting a "fundamentally unjust incarceration" is a judicial "imperative." *Murray v. Carrier*, 477 U.S. 478 (1986). *See also Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Schlup v. Delo*, 513 U.S. 298 (1995). Nowhere is this imperative more urgent than in cases in which courts review the legality of imprisonment by the Executive. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004); *Martinez*, 543 U.S. at 727; *Rasul*, 542 U.S. at 474; *Zadvydas*, 533 U.S. at 699-700; *INS v. St. Cyr*, 533 U.S.

289, 301 (2001); *see generally Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court under our constitutional system than the careful processing and adjudication of petitions for writs of *habeas corpus*."); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.").

The district court's premise that it could not bring the Petitioners into the continental United States was rejected in *Rasul*, in which this Court concluded that Guantánamo petitioners are *already* within the "territorial jurisdiction" of the United States. *See* 542 U.S. at 480-81 (finding that the United States "exercises complete jurisdiction and control" over the Guantánamo Bay Naval Base"). When this Court concluded that the district court had jurisdiction of Guantánamo *habeas* cases, and that the petitioners were in a "place that belongs to the United States," it did not mean that a court that granted relief would be bringing Guantánamo petitioners to the United States. The Secretary of Defense did that years ago.

This Court recognized long ago that it is "a monstrous absurdity in a well organized government that there should be no remedy, although a clear and undeniable right shou be shown to exist." *Kendall v. United States*, 12 U.S. (Pet.) 524, 624 (1838); *see* 3 W. Blackstone, COMMENTARIES 23 (1783) ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."). Certiorari should be granted to review the district court's contrary decision in this case.

B. Certiorari Before Judgment Is Warranted in the Extraordinary Circumstances of this Case.

Certiorari before judgment is rarely granted, and "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice

and to require immediate determination in this Court." SUP. CT. R. 11. It has most commonly been permitted where a case of public moment presents a square conflict between core functions of two branches of government. *E.g.*, *United States v. Nixon*, 417 U.S. 927 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). It has also been granted in cases involving a significant question concerning the relations of the United States to other nations, *see Dames & Moore v. Regan*, 453 U.S. 654, 667-68 (1981); *Wilson v. Girard*, 354 U.S. 524, 526 (1957); *The Three Friends*, 166 U.S. 1, 5 (1897), and where questions concerning the war powers of the Executive are involved, *see Reid v. Covert*, 351 U.S. 487, 488 (1956); *Kinsella v. Kruger*, 351 U.S. 470, 473 (1956); *Youngstown*; *Quirin*; *The Three Friends*. This case fits the unusual mold of cases in which the Court has granted certiorari before judgment.

This Court's intervention is called for to address an urgent, systemic need. In 2004, concerned about indefinite detention that could stretch "from months to years," *see Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment), this Court, using the plainest possible words, directed that the district courts should "consider in the first instance the merits" of the Guantánamo cases, mandating that cases with merit should be identified, facts determined, remedies ordered, and issues sharpened for any further appellate review necessary. 542 U.S. at 485. *Rasul* held "that section 2241 confers on the district court jurisdiction to *hear* petitioners' habeas corpus *challenges* to the legality of their detention." *Id.* at 484 (emphasis supplied). A hearing on a *petitioner's* challenge means a hearing on facts and law, not a mere test of pleadings under Rule 12(b) of the Federal Rules of Civil Procedure (which would be the Executive's challenge, not a petitioner's). That the Court had in mind such a contest is plain in the text, but lest there should be confusion, the Court added a note. *Id.* at 483 n.15. The Court then directed "the District Court to consider in the first instance the merits of the claims." *Id.* at 485.

Executive obstructionism and (Petitioners regret to say) the acquiescence of the lower courts resulted in disobedience of that mandate. Following a renewed government motion to dismiss the first-filed Guantánamo cases, all of the *habeas* cases were stayed from and after February, 2005, with the result that *not a single Guantánamo habeas case was considered on the merits until this one, in December, 2005*. The record of delay and resistance in the Guantánamo cases, including this one, threatens to mock the judiciary itself, raising the "monstrous absurdity" of right without remedy, *Kendall*, 12 U.S. (Pet.) at 624; ignoring the "imperative of correcting a fundamentally unjust incarceration," *Engle*, 456 U.S. at 135; and allowing the Executive to wield power unchecked, in contravention of the Constitution.

The Court has taken the unusual step of granting certiorari before judgment in cases that demonstrate a systemic fault line in the justice system itself, and when the Court needs to protect the institutional authority of the judiciary. *See United States v. Fanfan*, 542 U.S. 956 (2004); *Mistretta v. United States*, 488 U.S. 361, 370-71 (1989); James Lindgren & William P. Marshall, THE SUPREME COURT'S EXTRAORDINARY POWER TO GRANT CERTIORARI BEFORE JUDGMENT IN THE COURT OF APPEALS, 1986 S. Ct. Rev. 259, 287-88, 294-95 (1986).

No legal issue in this case will benefit from consideration by the court of appeals. The ruling that the Petitioners' imprisonment is illegal is plainly correct. The district court correctly analyzed and rightly rejected the Executive's vague claim of a limitless power to seize aliens in places far from battlefields, transport them across the globe, and imprison them at its pleasure. The Executive cited no authority in support of its claim, and there is none. *See* Pet. App. 4a-6a.

Certiorari before judgment is also appropriate because of the impact of the district court's ruling on the foreign affairs of the United States. In ignoring this Court's directive in *Rasul*, and abdicating its judicial function, the district court's decision

once again renders Guantánamo Bay a place and a prison beyond law. Because the Executive asserts the power to seize persons -- such as these very Petitioners -- in sovereign nations like Pakistan and hold them indefinitely at Guantánamo, the district court's ruling is a proclamation to the world that our Executive has set up a lawless reserve. This can only damage the foreign relations and prestige of the United States.[9] A prompt decision that there is indeed a remedy for lawlessness would have the opposite and salutary effect.

Similar circumstances led to the first grant of certiorari before judgment, during the Cuban Revolution that preceded the Spanish-American war. In *The Three Friends*, the Executive arrested a ship under a federal law that prohibited outfitting a vessel for a "foreign colony, district, or people," to wit, Cuban revolutionaries. 166 U.S. at 58. The owners successfully argued to the district court that Cuban revolutionaries were not a "foreign colony, district, or people," despite the Executive's broad claim that they were. *Id.* The Court granted certiorari before judgment in view of the public importance of the matter. *Id.* at 49. *See* Lindgren & Marshall, 1986 S. Ct. Rev. at 268-69. As the Court put it later that Term:

> [Certiorari before judgment was granted in *The Three Friends* because] the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the Executive Department of Government but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

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[9] For example, on January 9, 2006, the Chancellor of Germany, an ally of the United States, publicly called for the closure of the Guantánamo Prison. *See Guantanamo Mustn't Exist in Long Term*, Der Spiegel, January 9, 2006; http://www.bbc.co.uk.

Forsyth v. City of Hammond, 166 U.S. 506, 514 (1897). *See also United States v. Nixon*, 417 U.S. at 686-87, 690 (granting certiorari before judgment in a case involving the reach of the Executive power because of the "public importance of the issues presented and the need for prompt resolution"); *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy"); Lindgren & Marshall, 1986 S. Ct. Rev. at 292-93 ("Effective foreign policy . . . requires consistent signals.").

Without certiorari before judgment, resolution of the question presented herein likely would be delayed for at least a fifth year. The Executive has made plain its determination to resist to the last extreme every adverse ruling in the Guantánamo cases; indeed, every effort by coordinate branches of government to constrain its actions.[10] The party disappointed in the court of appeals surely will seek certiorari here. That procedural delay will not only would add to the substantive harm suffered by these innocent Petitioners now imprisoned at Guantánamo, it will cast a significant cloud over the Executive's compliance with its domestic and international obligations and promote continuing uncertainty as to the judicial power in other cases.

If this case involved simply an erroneous ruling by a district court, the Petitioners would not be seeking the Court's intervention now. But this particular error empties *Rasul* and *Hamdi* of meaning for every current or future alien prisoner of

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[10] On December 30, 2005, the President signed legislation banning torture, but announced himself unconstrained by the legislation in the exercise of his war powers. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 Weekly Comp. Pres. Doc. 1918 (Dec. 30, 2005).

the Executive, in an age of unprecedented assertion and exercise of Executive power. If a district court lacks the power even to parole human beings whom the court has determined are being held without any legal basis, then there is no set of facts in the hundreds of pending cases -- or, indeed, in future cases involving Guantánamo or other Executive prisons in other places -- in which any meaningful judicial action can be taken.

When this Court remanded *Rasul* to a district judge to "consider in the first instance the merits" of a Guantánamo *habeas* petition, *see* 542 U.S. at 485, it did not envision an academic exercise. If the Court believed, as the district court ruled in the decision below, that "a federal court has no relief to offer," it would have affirmed, rather than reversed, the decision of the court of appeals that the petition should be dismissed.

On rare occasions, the structural importance of a constitutional issue requires this Court's intervention before judgment. The twin legal propositions challenged in this case -- that imprisonment may be at the Executive's pleasure, and that the judicial branch is impotent -- present such an issue here. In *Hamdi*, this Court said that "[the writ of *habeas corpus*] ensur[es] that [the Executive] does not detain individuals except in accordance with law." 542 U.S. at 525. That statement was true then. It is not true today. For that reason, certiorari before judgment is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari before judgment.

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED DECEMBER 22, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-0497 (JR)

ABU BAKKER QASSIM, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

MEMORANDUM

Abu Bakker Qassim and A'del Abdu Al-Hakim are Muslim Uighurs, natives of China's western semi-autonomous Xinjiang province. They were captured by Pakistani security forces in late 2001 or early 2002, delivered into U.S. custody, and held in Afghanistan for approximately six months. In June 2002 they were transferred to the naval base at Guantanamo Bay, Cuba, where they were detained as "enemy combatants," and where they remain to this day, even though as much as nine months ago[1] a Combatant Status

1. The record does not reflect the date of the CRST determination.

Review Tribunal (CSRT) determined that "they should no longer be classified as enemy combatants." Resp't Mem. in Opp'n to Mot. to Vacate Stay Order at 4, n.5.

Qassim and Al-Hakim petitioned for a writ of habeas corpus on March 10, 2005. The government (which knew about the CSRT determination but advised nobody) moved for a stay of proceedings pending the Court of Appeals' decision in the consolidated appeals of *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), and *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. 443 (D.D.C. 2005). Petitioners (whose counsel were ignorant of the CSRT determination) moved for a preliminary injunction. On April 13, 2005, I (also ignorant of the CSRT determination) denied the motion for preliminary injunction and granted a stay of all proceedings concerning these petitioners, including "their release, repatriation, or rendition."[2]

In the midst of this motions practice, counsel for petitioners twice sought information from the government about proceedings before the CSRT, *see* Manning Decl., Exs. G-H. The government did not respond.[3] It was only in mid-

2. Both sides have appealed that stay order, but the parties agree that the pendency of their appeals does not oust this Court of jurisdiction to decide the matters presented by petitioners' instant motions.

3. At a hearing held on August 1, 2005, the government acknowledged receiving informal discovery requests for the 120 detainee cases it has, and stated that it generally did not respond to such requests "simply because we're not in a position to do it, especially when these cases should be stayed because the legal issues involved are before the Court of Appeals." August 1, 2005 Tr. at 16.

July, when petitioners' counsel traveled to Guantanamo Bay to meet their clients for the first time, that counsel were informed by their clients that the CSRT had found them not to be enemy combatants. After this information was confirmed by a JAG officer stationed at Guantanamo Bay, Willett Decl. ¶ 15, counsel filed an emergency motion to vacate the stay order and for their clients' immediate release. The government opposed, and a hearing was held on August 1, 2005.

The status of "enemy combatant" has been, until now, the only handhold for the government's claim of executive authority to hold detainees at Guantanamo. It is the only rationale approved by the Supreme Court, *see Hamdi v. Rumsfeld,* 124 S.Ct. 2633, 2639-40 (2004). Now that these petitioners are classified as "no longer enemy combatants" (NLECs), the government has had to articulate a new reason for continuing to hold them. That reason, asserted at the August 1 hearing, again in the government's post-hearing memorandum, and yet again in open court on December 12, 2005, is "the Executive's necessary power to wind up wartime detentions in an orderly fashion." Resp't Supplemental Mem. at 12.

On August 19, 2005, I issued a memorandum order stating, "It is not necessary to decide whether such a 'wind up' power really exists . . . , because the parties agree that Qassim and Al-Hakim should be and will be released." In light of this agreement, and the government's assurance that diplomatic efforts were being made to find a country that would accept the petitioners, I withheld decision on the motion to vacate.

Appendix A

Four months have passed since that order, and four years have passed since the petitioners were locked up. At the December 12 hearing the government asserted that progress is being made on the diplomatic front but declined to elaborate except *in camera*. I declined to receive secret information on that subject—information that could have been offered only to coopt the court and seek further delay. Petitioners now urge that action be taken promptly—immediately, in fact, because petitioners fear that Congress is about to enact legislation that will strip the federal courts of habeas jurisdiction over Guantanamo detainees. I announced on December 12 that I would rule within two weeks, so that, whichever way the ruling went, the case might at least be put into an appealable posture.

The case presents two fundamental questions: Does the government have "wind up" authority indefinitely to detain non-U.S. citizens at Guantanamo Bay, if they are not enemy combatants? If not, does a district court have the authority to fashion an effective remedy for the illegal detention?

Legality of petitioner's indefinite detention

The government claims that it has authority for petitioners' continued detention because the Executive has the "necessary power to wind up wartime detentions in an orderly fashion." Resp't Supplemental Mem. at 12. A major premise of that claim, of course, is that petitioners' detention was lawful in the first place. *Hamdi* did confirm the proposition that the Executive has power to wage war and detain suspected enemy combatants, that is, persons alleged to be "'part of or supporting forces hostile to the United States

or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516 (quoting the government's proffered definition of enemy combatant), but the government has not stated that these petitioners were ever suspected of having engaged in armed conflict against the United States. What we know of them is only that they were captured as they fled towards Pakistan after the inception of coalition bombing. *See* Hood Decl. ¶ 2. The government's use of the Kafka-esque term "no longer enemy combatants" deliberately begs the question of whether these petitioners ever were enemy combatants.

The support the government offers for its assertion of "wind up" authority is unpersuasive and, in my view, actually cuts against the government's position. As the Supreme Court noted in *Hamdi,* the authority to detain in wartime is grounded in the need to prevent captured individuals from returning to the field of battle. 542 U.S. at 518-21; *see also* Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war") (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)). Because of this limited purpose, the laws of war require that detention last no longer than the active hostilities. *Hamdi,* 542 U.S. at 521 (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities")). Nothing in this record establishes that the

government has or could reasonably have a concern that these petitioners would return to the battlefield if released.

Even if petitioners' initial detention was lawful, however, and even assuming that some reasonable wind up period of detention was allowable, their continued detention for nine months after the CSRT found them to be NLEC's far exceeds the presumptive limit of six months the Supreme Court applied in the analogous context of removable and excludable aliens detained under immigration statutes. *See Zadvydas v. Davis,* 533 U.S. 678 (2001) (presumptive limit to reasonable duration of post-removal-period detention under INA for removable alien is six months); *Clark v. Martinez,* 543 U.S. 371 (2005) (six-month presumptive limit to detention applies to inadmissible aliens). The detention of these petitioners has by now become indefinite. This indefinite imprisonment at Guantanamo Bay is unlawful.

Availability of an effective remedy

Ordinarily, a district judge reviewing a habeas petition does not need to proceed very far beyond determining that the detention is unlawful before ordering petitioner's release. The ordinary case, however, does not involve (I) aliens (ii) held outside the geographic territory of the United States (though not outside its "complete jurisdiction and control," *see Rasul v. Bush,* 542 US 466 (2004)) (iii) in a camp inside a secure military facility. The habeas statute requires a court after determining the facts to "dispose of the matter as law and justice require," 28 U.S.C. § 2243. The question in this case is whether the law gives me the power to do what I believe justice requires. The answer, I believe, is no.

Appendix A

Until a few days ago, petitioners were urging me to invoke the plain language of the habeas statute and order the government to "produce . . . the bod[ies]" of the petitioners at a hearing to be held in this court. At such a hearing, they argued, I would evaluate the government's security concerns and then set appropriate conditions for petitioners' release into the community, on parole, until the government could arrange for their transfer to another country. *See, e.g., Baker v. Sard,* 420 F.2d 1342, 1343 (D.C. Cir. 1969) (district court has "an inherent power to grant relief *pendente lite,* to grant bail or release pending determination of the merits"); *Mapp v. Reno,* 241 F.3d 221, 226 (2d Cir. 2001) (citing *Baker v. Sard* in alien case).

The government's first objection to this suggestion, invoking the doctrine of consular non-reviewability, *see, e.g., City of New York v. Baker,* 878 F.2d 507, 512 (D.C. Cir. 1989), is wide of the mark. These petitioners are not applying for visas, and there has been no exclusion or removal order. If genuine issues of material fact existed with regard to the legality of petitioners' detention, I believe the language of the habeas statute and the authority of *Rasul v. Bush* would trump decisions like *Baker* and support an order to produce the bodies of the petitioners here. (Note that the Supreme Court issued its decision in *Rasul* over the dissent's reminder of "the dire warning of a more circumspect Court" in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), of the burdens and even dangers of such a ruling. 542 U.S. at 499.) Here, however, there is no need for a hearing to resolve factual issues relating to the legality of petitioners' detention, for the government concedes that petitioners are NLECs. The command of the habeas statute is qualified. It requires the court to order the

body of the petitioner produced "[u]nless the application for the writ and the return present only issues of law." 28 U.S.C. § 2243. Only issues of law are presented here, and there is no requirement to produce the body.

Petitioners' alternative suggestion that I order them released into the general population of the base at Guantanamo Bay was summarily rejected by my order of August 19, 2005. Such an order would raise serious constitutional problems without significantly improving petitioners' situation. Guantanamo Bay is a secure military installation under the command of military officers whose mission is an ongoing part of the President's duties as commander in chief. Petitioners cite no authority for the proposition that I can order the military to allow a civilian, much less a foreign national, access to a military base, and of course I cannot. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy,* 367 U.S. 886, 890 (1961). Accordingly, a commander may, "in his discretion, exclude private persons and property . . . or admit them under such restrictions as he may prescribe in the interest of good order and military discipline." *Id.* at 893 (internal quotation marks and citations omitted).

At the December 12 hearing I postulated another alternative, as a sort of thought experiment: a simple order requiring the petitioners' release, without specifying how, or to where. After thinking about it for a few days, the petitioners embraced the idea (Memorandum of 12/16/05, Dkt. # 56). The experiment cannot work, however.

"[H]abeas corpus is at its core, an equitable remedy." *Schlup v. Delo,* 513 U.S. 298, 319. Judges have "broad discretion" to fashion an appropriate remedy. It may extend beyond simply ordering the release of a petitioner, *Carafas v. LaVallee,* 391 U.S. 234 (1968), and is to "be administered with the initiative and flexibility essential to insure that miscarriages of justices within its reach are surfaced and corrected." *Harris v. Nelson,* 394 U.S. 286, 291. Habeas corpus "never has been a static, narrow, formalistic remedy; its scope has been to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham,* 371 U.S. 236, 243 (1963). At its historical core, habeas corpus "has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Rasul,* 542 U.S. at 474 (citations omitted). The Supreme Court has noted its "scope and flexibility—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes." *Harris,* 394 U.S. at 291.

To order these petitioners released, however, would require cutting through more than "barriers of form and procedural mazes." The obstacles are constitutional and involve the separation of powers doctrine. It appears to be undisputed that the government cannot find, or has yet not found, another country that will accept the petitioners. Thus, the only way to comply with a release order would be to grant the petitioners entry into the United States. Although, as noted above, the immigration/alien exclusion cases are not strictly applicable, a strong and consistent current runs through them that respects and defers to the special province

of the political branches, particularly the Executive, with regard to the admission or removal of aliens. Long after the Chinese exclusion cases, *Fok Yung Yo v. United States*, 185 U.S. 296, 305 (1903); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893), it was settled law that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of this nation," *Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950), and that "the conditions of entry for every alien . . . have been recognized as matters . . . wholly outside the power of [courts] to control." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977).

These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States—even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted"—would have national security and diplomatic implications beyond the competence or the authority of this Court.[4]

Conclusion

In *Rasul v. Bush*, the Supreme Court confirmed the jurisdiction of the federal courts "to determine the legality of the Executive's potentially indefinite detention of

4. I reject the government's argument that Congress' enactment of the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005) ("Real ID Act"), operates to repeal or override whatever powers the habeas statute may confer in this case. Congress amended the INA to exclude district court jurisdiction over *immigration* decisions. Real ID Act § 106(a).

individuals who claim to be wholly innocent of wrongdoing." 542 U.S. at 485. It did not decide what *relief* might be available to Guantanamo detainees by way of habeas corpus, nor, obviously, did it decide what relief might be available to detainees who have been declared "no longer enemy combatants." Now facing that question, I find that a federal court has no relief to offer.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-0497 (JR)

ABU BAKKER QUASSIM, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ORDER

For the reasons stated in the accompanying memorandum, Petitioners' motion to vacate the stay order is **granted** in part and denied in part, and petitioners' petition for a writ of habeas corpus is **denied**. This is a final, appealable order.

JAMES ROBERTSON
United States District Judge

Supreme Court, U.S.
FILED
MAR 23 2006
OFFICE OF THE CLERK

No. 05-892

In the Supreme Court of the United States

ABU BAKKER QASSIM, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Detainee Treatment Act of 2005 divests the courts of jurisdiction over this case.

2. Whether the district court properly held that the military was not required to release petitioners upon its determination that they should no longer be detained as enemy combatants, where petitioners object to being returned to their native country and have no immigration status or other right permitting them to enter the United States, and where the Executive is actively seeking to find another country that will accept them.

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In the Supreme Court of the United States

No. 05-892

ABU BAKKER QASSIM, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-11a) is reported at 407 F. Supp. 2d 198. The case is currently pending before the court of appeals, and, hence, there is no opinion of the court of appeals at this time.

JURISDICTION

The order of the district court (Pet. App. 12a) was entered on December 22, 2005. The notice of appeal was filed on December 23, 2005. The petition for a writ of certiorari before judgment was filed on January 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e). The court of appeals, and in turn this Court, lacks jurisdiction because of the Detainee Treatment Act of 2005. See pp. 9-11, *infra*.

STATEMENT

1. On September 11, 2001, the United States endured the most deadly and destructive foreign attack in its history. In response, the President took immediate action to defend the country and prevent additional attacks, and Congress approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

The President ordered United States Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that had harbored it in Afghanistan. Although United States troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat against these enemies remains active and ongoing. Many Americans have been killed or wounded in combat, and many more continue to be in harm's way in order to defeat al Qaeda and the Taliban, and to protect this Nation from further attacks.

As in the case of every other major armed conflict in the Nation's history, in the course of these conflicts, the United States has captured and detained thousands of individuals. Consistent with the law and settled practice of armed conflict, it has detained a small fraction of them as enemy combatants. Approximately 480 of these enemy combatants are being held at the United States Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is an alien.

2. Every Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT). The United States military established those tribunals "to determine, in a fact-

based proceeding, whether the individuals detained * * * at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba 1 (July 29, 2004) (England Memo) <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. Out of the 558 CSRT hearings conducted, 38 resulted in determinations that the detainee in question should no longer be classified as an enemy combatant. See *CSRT Summary* (visited Mar. 17, 2006) <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf>.

When a detainee is determined to "no longer be classified as an enemy combatant," the Secretary of the Navy advises the "DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with the representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws." England Memo, Enclosure 1, at 9 (CSRT Process). It is, however, the "policy of the United States, consistent with Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured." C.A. App. 205.

3. Petitioners are ethnic Uighurs and natives of China. Before September 11, 2001, they received weapons training near Tora Bora, Afghanistan, at a military training facility supplied by the Taliban. C.A. App. 233-234; Pet. App. 1a. After the September 11 attacks on

the United States, Northern Alliance forces approached the military training camp, and petitioners fled with others to the nearby Tora Bora caves. They then fled to Pakistan, where they were captured by Pakistani forces and turned over to the United States military. Pet. App. 1a; C.A. App. 234.

Petitioners were screened by the Department of Defense (DoD) in Afghanistan, determined to be "enemy combatants," and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. C.A. App. 83, 233-234. There, the United States granted each petitioner a hearing before a CSRT to determine whether the detainee should continue to be held as an enemy combatant. *Id.* at 233. For the purposes of the CSRT proceedings, "enemy combatant" was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Order Establishing CSRT para. a (DoD July 7, 2004) <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. "This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Ibid.* In March 2005, petitioners received CSRT determinations that they should no longer be considered enemy combatants. C.A. App. 233-234; Pet. App. 1a-2a & n.1.[1]

Typically, a CSRT determination that a detainee should no longer be held as an enemy combatant will prompt the detainee's return to his native country. Petitioners vigorously oppose, however, being released to

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[1] Although it will lead to a detainee's release from military custody, a CSRT determination that a detainee should no longer be held as an enemy combatant does not invalidate the military's initial judgment that an individual should be detained as an enemy combatant. See p. 12, *infra*.

their native country.[2] As a result, they are being detained by the military pending the outcome of substantial ongoing diplomatic efforts to transfer them to an appropriate country. Pet. App. 3a. In the meantime, petitioners are housed by DoD at Guantanamo in "Camp Iguana" with other individuals who have received favorable CSRT determinations. In Camp Iguana, petitioners have a communal living arrangement with access to all of the areas of the Camp, including the exercise/recreation yard, their own bunk house, and activity room. Petitioners also have had access to a television set with VCR and DVD capability, a stereo system, recreational items (for activities such as soccer, volleyball, and ping pong), unlimited access to a shower facility, air conditioning in all living areas (which they control), special food items, and library materials. C.A. App. 234-235.

4. Petitioners filed a habeas action in district court demanding their release from detention. On December 22, 2005, the district court denied the habeas petition and entered final judgment. Pet. App. 1a-12a. The court held that the present detention of petitioners, who are no longer classified as enemy combatants, "is unlawful" because, even assuming their initial detention was lawful, their continued detention has "exceed[ed] the presumptive limit of six months the Supreme Court applied in the analogous context of removable and excludable aliens detained under immigration statutes." *Id.* at 6a (citing *Zadvydas* v. *Davis*, 533 U.S. 678 (2001); *Clark* v. *Martinez*, 543 U.S. 371 (2005)). The district court further held, however, that it could not order petitioners' release. *Id.* at 6a-11a.

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[2] As noted above, it is the policy of the United States not to return individuals to countries where it is more likely than not they will be tortured (C.A. App. 205).

The district court observed that it was "undisputed that the government cannot find, or has not yet found, another country that will accept the petitioners." Pet. App. 9a. Thus, the court found that "the only way to comply with a release order would be to grant the petitioners entry into the United States." *Ibid.* After explaining that it is "settled law that the power to exclude aliens 'is inherent in the executive power to control the foreign affairs of this nation,'" *id.* at 10a (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950)), and that "the conditions of entry for every alien . . . have been recognized as matters . . . wholly outside the power of [courts] to control," *ibid.* (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 796 (1977)), the district court held that it could not issue such relief:

> These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States—even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted"—would have national security and diplomatic implications beyond the competence or the authority of this Court.

Ibid. The court therefore denied the petition for a writ of habeas corpus. *Id.* at 12a.

5. On December 23, 2005, petitioners filed a notice of appeal to the District of Columbia Circuit. Petitioners then filed a motion to expedite the appeal. On January 27, 2006, the court of appeals granted that motion. Pursuant to the court of appeals' order, appellate briefing was completed on March 22, 2006, and oral argument is scheduled for May 8, 2006.

ARGUMENT

Petitioners seek the extraordinary remedy of certiorari before judgment. This Court's rules make clear that such a premature petition will not be granted unless it meets the most stringent criteria for this Court's immediate intervention. See Sup. Ct. R. 11 (certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). Those criteria are not remotely satisfied here. Petitioners are unable to show irreparable harm of a nature that would warrant immediate review; the court of appeals has agreed to expedite review such that the case will likely be decided in time that petitioners could seek review after judgment during the 2006 Term; the legal issues would benefit from consideration and elaboration by the court of appeals; and the court of appeals' decision or other events could well eliminate the need for this Court's intervention altogether. Accordingly, the petition for a writ of certiorari before judgment should be denied.

1. Certiorari before judgment is particularly inappropriate here because it is highly unlikely that bypassing the court of appeals would hasten the ultimate resolution of petitioners' claims. The court of appeals has expedited review to the point that the case is already fully briefed in that court and set for argument on May 8, 2006. In other words, the case will be argued and likely be decided by the court of appeals before the case could be briefed and argued in this Court. Indeed, given the expedited manner in which the court of appeals is handling the case, that court is likely to issue a decision in such time that petitioners could, if they chose to do so, seek plenary review of such a decision in this Court dur-

ing the 2006 Term. Thus, even if petitioners' arguments had any merit (which, for the reasons discussed below, they do not) there would be no reason to prevent the District of Columbia Circuit from considering the appeal on the fast track on which it has already been placed.[3]

2. Petitioners argue (Pet. 15) that this Court's "intervention is called for to address an urgent, systemic need" for resolution of legal issues relating to the status of detainees at Guantanamo Bay. That argument lacks merit. First, as mentioned above, because the case would likely be amenable to review next Term following a decision by the court of appeals, there is no point in resolving the issues without the benefit of a decision by the court of appeals. Second, at face value, the legal issues in this case are not appreciably different in kind or magnitude than those in other recent cases involving enemy combatants in which this Court has denied petitions for certiorari before judgment. See note 3, *supra*.

Finally, the fact that petitioners are detained (Pet. 18) does not establish that they are suffering irreparable harm requiring this Court's immediate intervention. That is true in virtually every habeas case, and in most criminal cases as well. The fact that the military has

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[3] Indeed, the case for bypassing the court of appeals here in order to expedite review by this Court is considerably weaker than in other recent cases in which this Court has *denied* petitions for writs of certiorari before judgment seeking review of the President's exercise of his war powers in the ongoing armed conflict with al Qaeda and the Taliban. See *Padilla* v. *Hanft*, 125 S. Ct. 2906 (2005) (denying petition for a writ of certiorari before judgment where expedition in the Fourth Circuit (including the scheduling of oral argument in July 2005) made it reasonably likely that the Court could consider the case during the 2005 Term); *Hamdan* v. *Rumsfeld*, 543 U.S. 1096 (2005) (denying petition for a writ of certiorari before judgment where the clear effect of that denial was to postpone Supreme Court review until the following term).

determined that petitioners' detention is no longer necessary to the war effort and that the United States is actively seeking to find a country into which they may be released does not establish that the case is of "imperative public importance" within the meaning of this Court's Rule 11. To the contrary, as the district court found, petitioners' predicament requires resolution by the political Branches, not the courts. Pet. App. 9a-10a. More to the point, the fact that the government is actively seeking through diplomatic means to facilitate petitioners' release from custody puts them in a more favorable position than other habeas petitioners.

3. The practical arguments against granting certiorari before judgment provide a sufficient basis to dispose of this petition. Petitioners' arguments on the merits also fail to meet the exceptionally high standard that this Court has set for certiorari before judgment. As explained below, there is a threshold jurisdictional bar to petitioners' habeas action and, in any event, their arguments on the merits are unavailing.

a. The Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, eliminates jurisdiction over habeas actions brought on behalf of Guantanamo detainees. As explained in detail in the government's motion to dismiss in *Hamdan* v. *Rumsfeld*, cert. granted, No. 05-184 (oral argument scheduled for Mar. 28, 2006), Section 1005(e)(1) of the DTA by its terms applies to all pending habeas cases and any other actions brought by Guantanamo detainees. It provides:

> (I) In General.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

> (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
>
> (A) is currently in military custody; or
>
> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

Petitioners' are aliens detained in military custody at Guantanamo Bay, and their habeas action therefore falls squarely with the terms of Section 1005(e)(1). Because the DTA removes habeas jurisdiction over this action, this action should be dismissed for want of jurisdiction.[4]

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[4] Because petitioners received a favorable CSRT determination, they have no claim under Section 1005(e)(2) and their case is not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. 1257. The impact of the DTA on the jurisdiction of the court of appeals will be a prominent feature of briefing in the court of appeals, and that fact further counsels against review at this juncture. The proper scope and effect of the DTA is an issue currently pending before this Court in *Hamdan*, cert. granted, No. 05-184 (oral argument scheduled for Mar. 28, 2006), and in the District of Columbia Circuit in *Al Odah*, No. 05-5064 (argued Mar. 22, 2006). That provides another

b. In any event, even apart from that jurisdictional defect, petitioners' claims are without merit. Petitioners argue that their detention is unlawful and that the district court erred in failing to grant them relief. Petitioners are incorrect on both scores.

Petitioners' detention is lawful. Petitioners went to Afghanistan to receive weapons training at a military training facility supplied by the Taliban near Tora Bora. C.A. App. 233-234. They were receiving that training when Northern Alliance forces approached the military training camp. Petitioners fled to the Tora Bora caves and ultimately to Pakistan, where they were captured by Pakistani forces and turned over to the United States military. Pet. App. 1a; C.A. App. 234. DoD screened petitioners in the zone of combat, determined that they were enemy combatants, and transferred them to the U.S. Naval Base at Guantanamo Bay for detention.

That quintessential military determination was reasonable under the circumstances and is entitled to effect. As a general matter, it is well within the scope of the U.S. military's authority to capture and detain persons who were trained at an enemy-supplied military training base in enemy territory and who were found fleeing that base during the armed conflict. The unconventional nature of the conflict in Afghanistan, in which the enemy purposefully blurs the distinction between combatants and non-combatants, only increases the need for the military to be permitted to make such determinations in a theater of active combat operations. As a plurality of this Court concluded in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004), the AUMF grants

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basis for denying certiorari before judgment in this case. Because there are many other reasons for denying certiorari before judgment in this case, this petition need not be held pending the disposition in *Hamdan*.

the President the power to detain enemies captured during our armed conflict with al Qaeda and the Taliban.

Petitioners correctly observe (Pet. 5) that the CSRTs, after thoroughly examining all of the information provided by the military and the detainees, ultimately determined that petitioners should no longer be held as enemy combatants, as that term was defined and implemented for the purposes of the CSRTs. That determination does not mean, however, that petitioners' original detention was inappropriate or unauthorized. Through a process unprecedented in the history of armed conflict, and more protective than the one-shot review envisioned by Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, the U.S. military has conducted a rigorous examination of a detainee's enemy combatant status based on information available at the time of the review, including any new information gathered subsequent to the detainee's capture. Under DoD instructions, the CSRT rulings regarding petitioners establish that it is no longer required that petitioners be detained as enemy combatants; the rulings do not, however, provide a basis to conclude that their initial detention following their capture in a foreign combat zone was unlawful.

The Executive's power to detain enemy combatants necessarily includes the authority to wind up detention in an orderly fashion after a determination has been made that it is no longer necessary to hold a detainee for war-related reasons. Typically, when a CSRT finds that a detainee should no longer be held as an enemy combatant, he is returned to his native country. England Memo, Enclosure 1, at 9 (CSRT Process). But petitioners vigorously oppose being sent to their native country. And the United States, consistent with its policy against returning an individual when it is more likely than not

that he will be tortured (C.A. App. 205), will not return petitioners to China. Thus, they are being detained by the U.S. military pending the outcome of extensive diplomatic efforts to transfer them to an appropriate country. Those efforts are active and ongoing and have been given high priority by the Executive Branch.[5] In the meantime, because petitioners are not eligible to enter the United States, it is not unlawful for the military to continue to detain them at Guantanamo—in the considerably less restrictive conditions of Camp Iguana, see p. 5, *supra*—until they can be properly resettled.

The district court's conclusion that the United States lacks authority to continue to detain those captured during an armed conflict, where the individuals oppose being returned to their native country and cannot safely be returned there, while some other venue for relocation is found, is contrary to both history and logic. Historically, the United States armed forces, like the armed forces of our allies, have continued the detention of prisoners of war following the end of major conflicts when the prisoner objects to repatriation in his native country. For example, at the end of the Korean War, approximately 100,000 Chinese and North Korean prisoners of war refused to return to their native countries, citing fears of execution, imprisonment, or mistreatment in their countries if returned. See Jan P. Charmitz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (1953); Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War*

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[5] The government offered to make a detailed *in camera* and *ex parte* report to the district court describing the ongoing resettlement efforts. C.A. App. 447. The district court declined the offer. *Ibid.*

157-165 (1977) (Delessert). The United Nations Command continued to hold those 100,000 prisoners for more than one and one-half years while it considered whether and how best to resettle them. See *id.* at 163-164.

Likewise, after World War II, Allied Forces spent several years dealing with prisoners of war they detained during the war, including thousands of prisoners who did not wish to return to their native countries. See Delessert 145-156 & n.53 (citing, *inter alia*, the fact that as late as 1948 England held 24,000 German prisoners who objected to being repatriated); Charmitz & Wit, *supra*, at 401 nn.46 & 48, 404 n.70; Christiane Shields Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights* in *World in Transition: Challenges to Human Rights, Development and World Order* 80 (Henry H. Han ed., 1979). Similarly, thousands of Iraqis were held in continued detention by the United States and its allies after the end of combat in the prior Gulf War because they objected to being repatriated to their native country. See DoD, *Conduct of the Persian Gulf War: Final Report to Congress* 620 (1992) (discussing the more than 13,000 Iraqi POWs who objected to being repatriated and remained in custody despite the end of hostilities).

In the district court, petitioners contended that their release was mandated by Article 118 of the Third Geneva Convention, which states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities," Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3406, 75 U.N.T.S. 224, and Article 132 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3606, 75 U.N.T.S. 376),

which provides that "[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist." The Geneva Convention does not create judicially enforceable private rights. Instead, as this Court recognized in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Convention's protections "are vindicated under it only through protests and intervention of protecting powers." *Id.* at 789 n.14. See *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, No. 05-184 (oral argument scheduled for Mar. 28, 2006); see also Gov't Br. at 30-34, *Hamdan*, No. 05-184.

In any event, the provisions on which petitioners rely presuppose that repatriation is possible. Significantly, the International Committee of the Red Cross commentary explains that the term "without delay" does not address the situation where the prisoner refuses to return to his native country. See International Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 541-550 (1960). In those situations, "[e]ach case must * * * be dealt with individually." *Id.* at 548. The general requirement of return without delay does not "affect the practical arrangements which must be made so that repatriation may take place consistent with humanitarian rules." *Id.* at 550.

c. Petitioners mistakenly rely on *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), and *Clark* v. *Martinez*, 543 U.S. 371 (2005), to support their contention that their continued detention is unlawful. There is no conflict with those cases warranting this Court's review, much less review before the court of appeals is afforded an opportunity to pass on the matter. Those cases resolved a question of statutory interpretation in a materially dif-

ferent context, and did not address constitutional issues of the sort petitioners seek to raise.

In both *Zadvydas* and *Clark*, this Court construed an immigration statute, 8 U.S.C. 1231(a)(6), which has no application here. That statute governs the detention of an alien *inside* the United States pending the execution of an immigration *removal* order. In *Zadvydas*, the Court held that this statutory provision "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," 533 U.S. at 689, and that six months after the removal order becomes final constitutes a presumptively reasonable period, *id.* at 701. *Clark* confirmed that *Zadvydas*'s interpretation of the statute applies to the removal of inadmissible aliens being held within the United States. See 543 U.S. at 378.

The immigration statute at issue in *Zadvydas* and *Clark*, which addresses detention of an alien in the United States pending the execution of an immigration removal order, is plainly inapplicable to petitioners here. Petitioners, who are not and have never been in the United States, are not being detained under that statute or any other immigration provision. See 8 U.S.C. 1101(a)(38) (defining the geographic scope of the United States for the purposes of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*); DTA § 1005(g), 119 Stat. 2743 (stating that Guantanamo Bay is not part of the United States). Moreover, in *Zadvydas*, this Court stated that it was not announcing a rule that would necessarily apply to immigration cases involving "terrorism or other special circumstances where * * * [there would be a need for] heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. In *Clark*, the Court expanded upon that statement, ex-

plaining that the Court's interpretation of Section 1231(a)(6) would not affect the ability of the government to detain aliens under other authority. 543 U.S. at 379 n.4. Given that petitioners here are not being held pursuant to the INA, the limitation on detention authority under Section 1231(a)(6) recognized in *Zadvydas* and *Clark* has no bearing on petitioners' case.

Furthermore, in construing the immigration statute at issue in *Zadvydas*, the Court relied upon a constitutional-avoidance analysis. That approach is inapplicable here. In *Zadvydas*, the aliens had been admitted for lawful permanent residence. 533 U.S. at 684-685.[6] The Court observed that the analysis would be very different for aliens, like petitioners here, who are outside of the United States. As the Court explained, "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693.

The more relevant immigration case is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). There, an alien who had been a 25-year resident of the United States left the country to visit his dying mother. The INS found that he could not legally re-enter. Mezei was stopped at the border and held in detention in the United States because no other country would accept him. He contended that his detention was indefinite and unlawful. The Court found that Mezei had no constitutional right to enter or obtain release into the United

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[6] In *Clark*, the aliens were seeking admission to the United States. 543 U.S. at 374-375. While the Court gave the detention statute the same construction it gave it in *Zadvydas*, those aliens, as a result of the Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), had no constitutional argument to be released into the United States.

States, even though he had been detained more than two years and even though at the time there was no prospect that another country would accept him. The Court explained that, "[w]hatever our individual estimate of [the decision not to release Mezei] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id.* at 216. The same rationale applies all the more here because petitioners likewise have no right to enter the United States, have never been present in the United States, and were captured during an armed conflict.[7]

d. Petitioners argue that a court can order the Executive to parole an alien into this country from outside the United States. That is incorrect. The cases on which petitioners rely (Pet. 10-11) deal with aliens who were already physically present in the United States and provide no authority for the relief they seek. Petitioners are held outside the United States on the island of Cuba. The INA defines the "United States" to in-

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[7] Petitioners also suggest (Pet. 18) that the district court's decision "empties [*Rasul* v. *Bush*, 542 U.S. 466 (2004)] and [*Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004)] of meaning." That is incorrect. Petitioners invoked the habeas jurisdiction that this Court held existed in *Rasul* (though that statutory jurisdiction has now been removed and supplanted in part by the DTA). *Hamdi* recognized that the military has the authority to capture and detain individuals, such as petitioners, who were determined to have associated with the enemy and were in the midst of a foreign combat zone. Moreover, *Hamdi* involved the detention in this country of an American citizen, who enjoyed constitutional rights that aliens detained abroad, such as petitioners, do not possess. See U.S. Br. 43, *Hamdan*, *supra* (No. 05-184). In any event, in *Hamdi*, this Court observed that the due process rights of an American citizen to challenge his wartime detention as an enemy combatant could be satisfied by affording such a detainee an administrative hearing before the military. See 542 U.S. at 538. Petitioners received such process, and more, pursuant to the CSRT process.

clude only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States," see 8 U.S.C. 1101(a)(38), and therefore excludes Guantanamo, which is located in Cuba. Further, in the DTA, Congress specified that, for purposes of judicial review of claims brought by detainees at Guantanamo Bay, the geographic scope of the "United States" should be as defined in Section 101(a)(38) of the INA and, "in particular, does *not* include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g), 119 Stat. 2743 (emphasis added).

In order to make a "lawful entry * * * into the United States," petitioners would have to be "admitted" to this country. 8 U.S.C. 1101(a)(13)(A). A court does not have the power to order the admission of petitioners. See *Fok Yung Yo* v. *United States*, 185 U.S. 296, 305 (1902) ("Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention."). With limited exceptions not relevant here, the INA provides that an alien outside the United States must have a visa to enter the country. See 8 U.S.C. 1182(a)(7). Petitioners have no such visas, and a court cannot order the Executive to issue them.

Furthermore, a judicial order requiring the government to bring petitioners into the United States not only would conflict with the INA, but also would be contrary to over a century of this Court's jurisprudence recognizing that the admission of aliens is a quintessential sovereign function reserved exclusively to the political Branches of government. As the Court explained long ago, "[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). That exclusion power is "to be regulated by treaty or by act

of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." *Ibid.*; see *Lem Moon Sing* v. *United States*, 158 U.S. 538, 546-547 (1895).

Because a district court may not review and override a denial of admission, it follows *a fortiori* that a court may not order admission in the first instance. Nor could a court order that the Government "parole" (Pet. 12) petitioners, which would temporarily admit them into the United States. Although the INA authorizes the parole of aliens who are applying for admission, 8 U.S.C. 1182(d)(5), the decision to parole—like the decision to admit—is vested solely in the Executive Branch's unreviewable discretion. See 8 U.S.C. 1182(d)(5)(A), 1252(a)(2)(B)(ii). Aside from admission or parole, there is no way for petitioners to be lawfully present in the United States. Under 8 U.S.C. 1182(a)(9)(B)(ii), an alien who "is present in the United States without being admitted or paroled" is "unlawfully present." See 8 U.S.C. 1182(a)(6)(A)(i) (aliens who have not been "admitted or paroled" are inadmissible).[8]

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[8] Last year, Congress clarified that the comprehensive preclusion of judicial review over discretionary immigration decisions also encompasses habeas review. In the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress amended the INA to make explicit that no court has jurisdiction under 28 U.S.C. 2241 or "any other habeas corpus provision" to review such discretionary decisions. See REAL ID Act § 106(a), 119 Stat. 310; see also *id.* § 101(f)(2), 119 Stat. 305 (providing that there is no jurisdiction "regardless of whether the judgment, decision or action is made in removal proceedings").

CONCLUSION

The petition for a writ of certiorari should be dismissed for lack of jurisdiction or denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY FOR THE PETITIONERS

The Executive's[1] obstructionism and the erroneous conclusion of the court below that the judiciary is powerless to do anything about illegal Executive imprisonment have created a crisis of the first magnitude -- one that threatens the system of checks and balances that grounds our Constitution as well as the very lives of the men imprisoned at Guantánamo. The public importance of the question presented in this case cannot be overstated.

But why should the Court grant certiorari now, with oral argument in the court of appeals set for May 8, 2006? The answer is crystallized in footnote four of the Executive's opposition. The Executive has avoided the mandate of *Rasul v. Bush*, 542 U.S. 466 (2004), for almost two years. That footnote shows its plan for the next two, and that plan *applies to every pending habeas case outside the military tribunal context*. There the Executive says that, "[b]ecause petitioners received a favorable CSRT determination, they have no claim under Section 1005(e)(2) [of the Detainee Treatment Act of 2005 (the "Act")] and their case is not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257."[2] This argument proceeds from the Act's language purporting to confine review in the court of appeals to challenges to the "validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Section 1005(e)(2)(A), codified at 28 U.S.C. § 2241(2)(A). Thus, the Executive argues, if, as in this case, an alien secures a CSRT determination that he is *not* an enemy combatant, no court at all has jurisdiction to order his release.

All of the other *habeas* appeals now plodding their way through the court of appeals involve a contest over whether the detainee is an "enemy combatant," and legal questions as to

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[1] Unless otherwise indicated, capitalized terms have the meanings ascribed to them in the petition.

[2] This case is properly "in" the court of appeals. *See* Pet. 8; *United States v. Nixon*, 418 U.S. 683, 690-92 (1974); Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 2.4 (8th ed. 2002).

whether that dispute should be resolved in the district courts under *habeas* review or in the court of appeals under the Act. The Executive now says that once that dispute is resolved in favor of the detainee, it will be free to extend imprisonment at its pleasure with no court review at all. That means that in every case of the hundreds pending in which, as in this one, a detainee is shown to have been wrongly detained, a new round of Executive obstructionism will commence -- with still more years of litigation, and the interminable stays, appeals, and delays that have already rendered judicial review all but useless. Quite apart from its Kafkaesque legal premise, this consequence should be intolerable to the Court as a practical matter.

Guantánamo is at the precipice. As the systemic failure to implement *Rasul* now reaches its second anniversary, suicide attempts and hunger strikes have become common. *See* Detainees' Br. 10-19.[3] Only prompt intervention by this Court to vindicate its own mandate can prevent the rule of law itself from being drowned in this intensifying whirlpool of desperation.

If the Court were to grant certiorari now and expedite the merits briefing (briefs could be submitted swiftly, as the case is fully briefed now in the court of appeals), it could decide this case before rising for the summer recess, as was done in *Felker v. Turpin*, 518 U.S. 651 (1996) (certiorari granted May 3, 1996; argued June 3, 1996; decided June 28, 1996). This is just that extraordinary case for which the statute and rule permitting review before judgment exist.

A. The Executive's Resort To Words Of Resonance

The Executive repeatedly incants incendiary words such as "weapons training," "fleeing," "Afghanistan," "military facility,"

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[3] Amicus briefs in support of the petition have been filed on behalf of more than 300 detainees incarcerated at Guantánamo ("Detainees' Br."), the Uyghur American Association ("Uyghur Br."), and the American Civil Liberties Union ("ACLU Br.").

"Taliban," "Tora Bora" to frighten the reader[4] and divert attention from the most salient fact in this case: the Executive itself concluded that Petitioners are not "enemy combatants" and, therefore, were not "part of or supporting Taliban or Al Qaeda forces or associated forces." Pet. 4. As for "weapons training," the Executive concluded that neither Petitioner is a "person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.*

The Executive does not claim that Petitioners had any affiliation with or even sympathy for the Taliban or that the Taliban trained or employed them. Knowing that to be false, it darkly asserts that the men were trained at a *facility* "supplied by the Taliban." Opp. 11. But the Taliban controlled essentially all property and commercial activity in most regions of pre-war Afghanistan.[5] Does that mean simply that the Taliban sold or rented the real property to whoever operated it? We do not and cannot know because there was no return, no factual hearing, and

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[4] The general proposition that Guantánamo houses "terrorists" and "enemy combatants" is myth. According to the CSRT findings, only five percent of Guantánamo detainees were taken on a battlefield. Mark Denbeaux *et al.*, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf ("DOD DATA"). Most, like these Petitioners, were sold for bounties by local tribesmen who received leaflets promising enormous (by local standards) amounts of cash. *Id.* at 3. CSRT records disclose not a single hostile act in the case of more than half of the detainees. DOD DATA 2; Detainees' Br. 6-10. The truth about the men held at Guantánamo has, until recently, remained unknown because of the refusal of the Executive and the courts to follow the mandate of *Rasul* and "consider in the first instance the merits of petitioners' claims." 542 U.S. at 485.

[5] OFFICE OF THE UN COORDINATOR FOR AFGHANISTAN, VULNERABILITY AND HUMANITARIAN IMPLICATIONS OF UN SECURITY COUNCIL SANCTIONS IN AFGHANISTAN 4 (Dec. 2000), http://www.humanitarianinfo.org/sanctions/handbook/docs_handbook/OCHA%20-%20Sanctions%20in%20Afghanistan.pdf (last visited Apr. 2, 2006); DOD DATA 16.

no chance to traverse a return. We do know -- because the CSRT so concluded -- that Petitioners were not "part of or supporting Taliban or al Qaeda forces, or associated forces."[6] Pet. 4.

The Executive also calls the Afghan village where the men stayed a "military training camp." Opp. 11. Even if that were true, the world is full of military training camps. Was this one hostile to the U.S.?[7] For all this record shows, the "military training camp" that General Hood speaks of (in a document that Petitioners were never permitted to address) was as supportive of U.S. interests as were the "camps" of the Northern Alliance. There is no evidence -- indeed, no overt assertion, although the implication is powerful and intentional -- that Petitioners were "trained" with malign or criminal intent toward U.S. interests, or that the "camp" had any connection to any conflict in which the President was authorized to engage by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), or Article II of the Constitution.

The "Guantánamo Myth" unravels when the reader focuses on what the record actually says. General Hood (who was not in Afghanistan himself, and never tells us where he learned what he has repeated in his affidavit) says that Petitioners received "training in, among other things, the use of small arms." That is, the general says, they were taught how to disassemble and assemble firearms, how to clean them, how to load, handle, aim and fire them. If this allegation is true, then Petitioners received the same "weapons training" that thousands of Americans lawfully receive every day.[8]

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[6] Petitioners should not be confused with, for example, Sayed Rahmutullah Hashemi, the former Taliban spokesman who today is a freshman at Yale. *See* Chip Brown, *The Freshman*, N.Y. TIMES MAG., Feb. 26, 2006, at 55.

[7] There is no record evidence that any Taliban personnel were at the "camp."

[8] *See e.g.*, National Rifle Ass'n, Basic Firearm Training Program, http://www.nrahq.org/education/training/find.asp?State=VA&Type= (weapons training offered at seventy-two different places in Virginia

Petitioners bear no animosity toward America and (remarkably) share the admiration for America so common to Uighurs regularly admitted here as political refugees from China. Uyghur Br. 9. If Petitioners are "dangerous," then so are the millions of Americans who daily receive the same weapons training that Petitioners are accused of receiving. Indeed, "[t]he United States believes that the responsible use of firearms is a legitimate aspect of national life. . . . We . . . do not begin with the presumption that all small arms and light weapons are the same or that they are all problematic." John R. Bolton, Under Sec'y for Arms Control and Int'l Sec. Affairs, Dep't of State, U.S. Statement at Plenary Session to the UN Conf. on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), *available at* http://www.state.gov/t/us/rm/janjuly/4038.htm.

The Executive's words of resonance, powerful as they may be in the court of public opinion, should be impotent in this Court. In particular, they should not be permitted to drown out one simple truth: *the Executive's own self-created process has found to be non-existent the only asserted basis for imprisoning these Petitioners.*

More remarkable still is the Executive's suggestion that it has indulged Petitioners' request not to return to their "native" country, is doing them a favor by not returning them to China, and is "hosting" them while it diligently seeks on their behalf a better situation. Opp. 13. But they were not living in China, bought in China, or held in China. The prisoners of war referred to by the Executive, *see id.*, were soldiers who had lived in China and North Korea before marching out with their armies. Petitioners were *not* soldiers and were living *outside* China when the Executive seized them.

The Executive itself has created the very circumstances that it says bars any relief for Petitioners. It has known for years that

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alone); Colin Harrison, *High: Vegas on $1,000 a Day*, N.Y. TIMES, Mar. 19, 2006 (Uzis, AK-47s, and Mac-10s are available for rent at the Las Vegas Gun Range and Firearms Center); Cumberland Tactics, http://www.guntactics.com/page6.php (offering "urban carbine" training).

Petitioners should not be at Guantánamo. Resettlement abroad has become all but hopeless, as the Executive long ago persuaded the rest of the world that Guantánamo prisoners are terrorists. The stain of this libel is indelible. Of the many wrongs done to the Petitioners, it may be the cruelest.[9]

B. The Petition Merits Certiorari Review.

1. The Act does not apply here and is not retroactive.

The Act has no bearing on this case because, by its terms, it applies only to actions seeking "to determine the validity of any final decision of a [CSRT] that an alien *is* properly detained as an enemy combatant." 28 U.S.C. § 2241(2)(A) (emphasis supplied). Since Petitioners seek to vindicate, not challenge, the CSRT's decision that they are *not* enemy combatants, the Act is inapplicable here, as the Executive explicitly concedes. Opp. 10 n.4; Brief for Appellees, *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed March 15, 2006) at 19 (stating that the Act "does not provide any remedy to petitioners in this case"). *Rasul* thus applies unchanged -- unless the Act is read to cut off *any* judicial challenge to Petitioners' imprisonment.[10]

The Act is not retroactive in any case, as demonstrated in briefs and argument presented to this Court in *Hamdan v.*

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[9] Justice Jackson wrote of Ignatz Mezei, the alien stranded at Ellis Island, "Since we proclaimed him a Samson who might pull down the pillars of our temple [Mezei was a suspected communist], we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

[10] As discussed above, this is the remarkable argument the Executive now wants to make. Of course, application of the Act to prisoners who have been cleared by a CSRT would create insuperable Suspension Clause issues. *See Hamdan v. Rumsfeld*, No. 05-184 March 28, 2006 Oral Arg. Tr. 48 ("Hamdan Tr."). For this and other reasons, if the Act were deemed to apply here, it would have to be construed to provide a remedy to avoid unconstitutionality.

Rumsfeld, No. 05-184,[11] and in the court of appeals in *Al Odah, Khaled A.F. v. United States*, No. 05-5064,[12] and *Boumediene v. Bush*, No. 05-5062.[13] Petitioners also have addressed the issue in the court of appeals.[14] But, again, that issue need not be reached in this case.[15]

2. The judiciary has the power and duty to provide a remedy for unlawful Executive imprisonment.

Contrary to the Executive's contention that Petitioners' imprisonment is lawful because the AUMF authorized their capture, *see* Opp. 11-12, Congress never authorized the President to purchase from Pakistan and export to Guantánamo opponents of Chinese communism. But even if it had that would not explain why Petitioners remain in captivity four years later. Thus the Executive is forced to invent a "wind up" power, *see* Opp. 12-14, presaging its approach in any other cases in which a detainee is exonerated by a fair process and confirming the need for immediate review. It cites no legal authority and points to inapposite history involving North Korean and Chinese soldiers taken on Korean battlefields and being returned to their homelands, and the Geneva-compliant, six-months-and-done post-war operations of the First Gulf War. It never explains what, if anything, limits this power. If the Executive may lawfully seize

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[11] *E.g.*, Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba, and their Family Members, in Support of Petitioner and in Support of Jurisdiction (filed Jan. 6, 2006).

[12] *See* Guantánamo Detainees' Supplemental Briefs Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, filed Jan. 25 and March 1), 2006)).

[13] *See* Supplemental Briefs of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005, filed Jan. 25 and Mar. 10, 2006)).

[14] *See* Brief of Petitioners-Appellants and Reply Brief of Petitioners-Appellants *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed Feb. 10, 2006 and March 22, 2006, respectively).

[15] For these reasons too, there is no basis to hold the petition pending a decision in *Hamdan*, a case that presents entirely distinct issues.

anyone, anywhere in the world, and confine him on an island forever, as long as it assures us that it is pursuing an "orderly windup,"[16] then we are long past little old ladies in Geneva who unwittingly give to the wrong charity.[17]

The Executive contends that, having seized individuals abroad and imprisoned them on a military base at a location of its choice, it may then invoke the nature and location of the prison as the reason the individuals may not be released, notwithstanding the illegality of the imprisonment. It cites *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the decision -- roundly criticized at the time and ever since -- that stranded Ignatz Mezei at Ellis Island, potentially indefinitely. It arose during a period not unlike our own, when a single word ("communist") prompted such fear and revulsion that few trifled to inquire whether, in a given case, the word fairly described the person branded with it. Justice Jackson -- who knew something of indefinite detention, having opened for the prosecution at Nuremberg by discussing what indefinite detention did to Germany[18] -- filed a dissent eerily predictive of our current national folly. "Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial," it began. *Id.* at 218. It continued: "Quite unconsciously, I am sure, the Government's theory of custody for 'safekeeping' without disclosure of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the 'protective custody' of the Nazis more than of any detaining

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[16] The Executive's position, vindicated by the court below, is that even that assurance must be accepted untested by the courts. *Cf.* Pet. 7.

[17] As this Court is aware, *see* Hamdan Tr. 21, the Executive argued in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C 2005), that it had the power to detain a "little old lady in Switzerland" who unwittingly gave to a charity front.

[18] 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 110-11 (1947). The indictment alleged that the defendants used "protective custody" to make the regime "secure from attack and to instill fear in the hearts of the . . . people." *Id.* at 34-35.

procedure known to the common law." *Id.* at 226. Three others joined him.

Unlike Petitioners, Mezei left the U.S. voluntarily and returned, voluntarily, without a visa. The Executive did not buy him or interrogate him for six months in Kandahar before deciding to bring him in chains to "territory over which the United States exercise exclusive jurisdiction and control," *Rasul*, 542 U.S. at 475, a "place that belongs to the United States," *id.* at 487 (Kennedy, J., concurring in the judgment). And while the government apparently believed that Mezei was a "communist," the Executive concedes that Petitioners are not enemy combatants.

The Executive dismisses *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), on the ground that they construe an irrelevant immigration statute. Opp. 15-17. But the rule of each case is that *no* statute can be read to permit indefinite imprisonment -- even if it deals with alien criminals and appears on its face to authorize their indefinite imprisonment.

3. The district court was obliged to fashion a remedy.

Petitioners asked only that the district court do what Congress said it should do: command that the bodies be produced, conduct a hearing, and should it find (as it rightly did) no lawful basis for their imprisonment, order their discharge. 28 U.S.C. § 2243.

The Executive does not respond to the authorities cited in the petition that require a court having jurisdiction to decide a case and give an effectual remedy. *See also* ACLU Br. 14-20. Nor does immigration law justify the district court's abdication of that duty. *Id.* 5-14. No immigration status was sought here. Granting the relief sought by Petitioners would not conflict with statutory law, usurp the immigration authority of the political branches, or contravene the separation of powers doctrine. *Id.* To hold otherwise would make a mockery of the "Great Writ of Liberty." *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (N.Y. Univ. Press 20[illegible]). In fact, it would lead to the conclusion that *habeas* itself is an unconstitutional violation of separation of powers. Every time the writ is granted, a court orders the Executive to release someone that it, in the exercise of its prerogatives, had chosen to imprison.

Until now, that had been seen as the essence of separation of powers -- checks and balances operating precisely as they should. If the Executive is found to have detained someone illegally it is subject to an enforceable judicial order that the individual be released if the illegality cannot be promptly remedied. Here, as in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Executive asserts an entitlement to unilateral decisonmaking that "serves only to *condense* power into a single branch of government." 542 U.S. at 536. Here, as in *Hamdi*, the Court should vindicate the rule of law by rejecting that claim.

C. Certiorari Before Judgment Is Warranted.

Two years after *Rasul*, hundreds of Guantánamo cases languish at a standstill, *see Hamdan* March 28 Tr. 6, 54; Detainees' Br. 5, while the sufferings of men trapped in a lawless limbo intensify. *See* Detainees' Br. 16-19. The Court has granted certiorari before judgment in circumstances presenting similar combinations of extraordinary public importance, systemic fault lines, and clashes between the coordinate branches. *See* Pet. 14-19.[19] The issues are plain and can be resolved only by this Court. Delay pending an appellate decision will perpetuate not just the harm being suffered by these innocent Petitioners, *see* Uyghur Br. 7-9, but also the intolerable uncertainty that is stymying the lower courts and sapping the authority of the judiciary. Petitioners pray that, for the reasons set forth herein, in the petition, and in the briefs filed by supporting amici, the Court grant certiorari now.

Respectfully submitted,

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[19] The Executive's reliance, *see* Opp. 8 n.3, on the orders in *Padilla v. Hanft*, 125 S. Ct. 2906 (2005), and *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005), is misplaced. Those cases did not involve detainees who were concededly not enemy combatants and had been found by a court to be imprisoned unlawfully. Further, those petitioners had been granted relief below and the Executive argued that this Court should defer review pending further fact-finding. *See Padilla*, No. 04-1342, Brief in Opposition 7, 12, 15 (May 9, 2005); *Hamdan*, No. 04-702, Brief in Opposition 7, 9, 11 (Dec. 2004).

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IN THE

Supreme Court of the United States

ABU BAKKER QASSIM, ET AL.,

Petitioners,

—v.—

GEORGE W. BUSH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTRODUCTION[1]

The petitioners in this case are detained by the United States at its military base at Guantanamo Bay, Cuba. The government itself has concluded that the petitioners do *not* qualify as "enemy combatants" and a federal district court has correctly held that petitioners' continued detention under these circumstances is unlawful. The critically important question now presented to this Court is whether the federal courts are powerless to order a remedy for this unlawful detention, as the district court held, thus leaving the Executive with unreviewable discretion to determine if and when petitioners' unlawful custody will end.

Amicus recognizes that *certiorari* before judgment is rarely granted. We nonetheless believe it is appropriate in this case because the district court's conclusion is so fundamentally at odds with the history and purpose of habeas corpus, and because the ruling below dramatically highlights a pressing need to provide the lower courts with clear guidance on the proper scope of judicial authority in a habeas corpus proceeding.

As set forth below, the district court's failure to grant relief rests on three fundamental errors. *First*, the court erred in concluding that this Court's immigration cases and the political branches' authority over the admission of aliens preclude the Judiciary from fashioning a meaningful remedy for petitioners' unlawful custody. To the contrary, *Clark v. Martinez*, 543 U.S. 371 (2005), rejected the same separation of powers and security concerns that seemingly stymied the district court in this case, and this Court's rulings provide

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[1] Pursuant to Supreme Court Rule 37.2, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

ample authority to "parole" petitioners into the community subject to appropriate safeguards.

Second, the district court misapprehended the authority and flexibility provided by 28 U.S.C. § 2243. That statutory provision embodies a congressional directive that habeas courts exercise broad remedial authority to formulate appropriate relief when immediate release is not feasible.

Third, this is not the first instance in which an executive has tried to shape its detention practices in order to frustrate the ability of habeas courts to issue appropriate relief. As a matter of history and practice, therefore, habeas courts have long possessed the authority to fashion remedial orders that preserve the efficacy of the Great Writ and to ensure that unlawful custody does not continue unabated and indefinitely. Were the rule otherwise, habeas courts would be reduced to issuing advisory opinions and the Suspension Clause would be largely eviscerated.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the principles of liberty and equality guaranteed by the Constitution and the laws of the United States. In furtherance of these goals, the ACLU has participated in numerous cases before this Court involving the scope of habeas corpus and the rights of non-citizens, including *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003).

STATEMENT OF THE CASE

Petitioners Abu Bakker Qassim and Adel Abdu' Al-Hakim have commenced their fifth year of imprisonment by the United States. They were seized in late 2001 or early 2002, held in Afghanistan, and transported to Guantanamo

Naval Base by the United States government in June 2002, where they have been incarcerated ever since and remain today. Pet. App. 1a. They filed habeas corpus actions through counsel on March 10, 2005. Pet. App. 2a. In July 2005, petitioners' attorneys learned that both Qassim and Al-Hakim had been determined *not* to be "enemy combatants" by the "Combatant Status Review Tribunals" in March 2005. Pet. App. 2a-3a.

In December 2005, the district court held that any legal basis for petitioners' detention had ended and that their continued incarceration was unlawful. Pet. App. 6a. Yet, the district court declined to order their release or issue a remedial order of any kind. Instead, the court concluded that, despite its categorical finding that the detention of these prisoners "is unlawful," Pet. App. 6a, habeas relief would be denied because "a federal court has no relief to offer." Pet. App. 11a.[2]

In the district court, the government opposed any order of release and rejected any alternative to the petitioners' ongoing (and indefinite) incarceration. The district court considered and denied reassigning petitioners to non-custodial quarters at Guantanamo or ordering the government to consider exercising its statutory authority to transport petitioners within the district court's jurisdiction from Guantanamo to the District of Columbia. Pet. App. 7a-

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[2] Since the district court's decision in this case, Congress has amended the habeas corpus statute in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005). Amicus does not address that statute or its impact on this case at this stage because it was not in effect at the time of the district court's ruling and played no role in the district court's reasoning. As the petitioners note in their petition for writ of *certiorari* before judgment, there are ample grounds for the Detainee Treatment Act not applying to this case, which the parties may fully brief if the Court deems it necessary.

8a. The district court ruled that it lacked the power to provide a remedy that it unambiguously "believe[d] justice requires," Pet. App. 6a, including an order "requiring the petitioners' release, without specifying how, or to where," Pet. App. 8a.

On December 23, 2005, petitioners filed their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. That appeal is currently pending and scheduled for oral argument on May 8, 2006.

ARGUMENT

The central question at issue here is whether the district court erred in failing to grant *any* relief after finding that the petitioners' detention is unlawful. That question is of pervasive and enduring importance and should be answered by this Court immediately to give proper guidance to the courts of appeals and district courts grappling with habeas corpus actions challenging the detention of foreign nationals at Guantanamo Naval Base.

In the government's view and under the district court's ruling, the Judiciary would be powerless to grant any relief whatsoever even though the United States transported the petitioners involuntarily to Guantanamo, the petitioners have been determined by the government itself not to be subject to "enemy combatant" designation, and the court has ruled that their custody is without legal authority. If the district court's holding is allowed to stand, the Executive will have effectively thwarted the Judiciary's authority to remedy unlawful incarceration by detaining petitioners at Guantanamo Naval Base and then invoking the nature and location of Guantanamo as the reason they cannot be released. Such contrivances cannot be reconciled with the purpose or the protections of the Great Writ.

The district court's conclusion is based on a misreading of this Court's immigration cases, is contrary to

the Judiciary's remedial power under 28 U.S.C. § 2243, and violates the core purpose and historical guarantee of habeas corpus.

1. *This Court's Immigration Cases Do Not Bar the Judiciary From Ordering Release and Authorizing Parole of Unlawfully Detained Non-Citizens.*

The district court concluded that it could not grant any relief because of its mistaken conclusion that the political branches' authority over immigration admission and exclusion preclude a habeas court from ordering petitioners' transportation to the District of Columbia under the parole authority of the Executive. The court reasoned that "the only way [for the government] to comply with a release order would be to grant the petitioners entry into the United States" and that doing so would run afoul of the "special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens." Pet. App. 9a-10a. The district court further believed that "[a]n order requiring their release into the United States – even into some kind of parole 'bubble,' some legal-fictional status in which they would be here but would not have been 'admitted' – would have national security and diplomatic implications beyond the competence or the authority of this Court." Pet. App. 10a (footnote omitted).

As an initial matter, the district court's opinion makes plain but does not acknowledge the contradiction within its own analysis. The court correctly concluded that it necessarily had the power to order the petitioners brought to the United States to appear at a hearing before the court "[i]f genuine issues of material fact existed with regard to the legality of petitioners' detention." Pet. App. 7a. If that were the case, "the habeas statute and the authority of *Rasul v. Bush* would . . . support an order to produce the bodies of

petitioners here." Pet. App. 7a. Then, the district court could presumably "set appropriate conditions for petitioners' release into the community, on parole, until the government could arrange for their transfer to another country." Pet. App. 7a (citing authority).

But the district court rejected relying on that inherent authority because petitioners' claim is purely legal rather than factual, and their presence in court is not required to adjudicate their petition. Pet. App. 7a. Even assuming the court is correct in characterizing petitioners' claim as legal, the district court's power to order detainees brought to the District of Columbia cannot turn on that difference. Either a habeas court possesses (as it must) the authority both to conduct necessary hearings and – more critically – to grant meaningful relief if the petitioner prevails, or it does not. The power of the habeas court cannot be less *after* a finding of unlawful detention, and cannot depend on whether the petitioners' claim raises factual or legal issues. If the court's remedial capacity were to turn on that distinction, it would create the ironic (if not perverse) incentive for petitioners to assert a factual claim in order to trigger the court's greater authority and thereby to obtain meaningful relief.

More fundamentally, the district court erred in concluding that it lacked authority to order the Executive to "parole" petitioners to the United States as a remedy for the unlawful detention. That relief would not cause petitioners to be "admitted" to the United States in any sense that contravenes the political branches' immigration authority. The court's conclusion that such an order would compel the petitioners' "*entry* into the United States," Pet. App. 9a (emphasis added), reflects a fundamental misunderstanding of the parole authority and this Court's precedents. Far from being supported by the immigration case law of the Court, the district court's analysis is inconsistent with the reasoning

of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005).

The immigration statute provides a specific mechanism, "parole," by which noncitizens can be brought to the United States, or released from detention, without conferring any of the statutory rights that would accompany "admission" or a legal "entry." *See* 8 U.S.C. § 1182(d)(5)(A). The Court long ago recognized that allowing parole out of detention does not confer legal status on the alien:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"

Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (citations omitted). *See also Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute). A paroled alien has long been deemed to remain in the same status as one "on the threshold of initial entry." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Ordering the Executive to exercise its statutory parole authority to remedy its own unlawful conduct that is causing petitioners' detention would not run afoul of the separation of powers doctrine or usurp the role of the political

branches.[3] In both *Zadvydas* and *Martinez*, the Court rejected the government's submission that a court compelling the release into the community (under appropriate supervision) of aliens who had no right to enter or remain in the United States would exceed the judiciary's authority or violate the separation of powers. In both cases, the Court emphasized that such release from detention did not transgress the courts' proper role. The Court acknowledged that the practical result of such an order would be release into the community. But it emphasized that such release did not confer a legal right to "liv[e] at large" but merely a right to be "supervis[ed] under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696.

Martinez is particularly relevant because in that case the Court confronted the situation of aliens who had never been granted entry to the United States. The Court's holding demonstrates that parole is a judicially-enforceable remedy for the unlawful executive detention of aliens with no right to enter the United States. The aliens in that case were detained, were deemed to be outside the country and indisputably had no right to be admitted to the United States. 543 U.S. at 374-75. Those aliens were detained because, like the petitioners here, they could not be removed to their home country and no other country would take them. They nonetheless asserted a right to be released from incarceration on the ground that their continued detention was unlawful. 543 U.S. at 374-75, 376. The Court held that their continued incarceration was without statutory authorization and that they must be released into the community. *See id.* at 386-87.

The government vigorously argued in *Martinez*, as it has in this case, that judicially compelled release of those

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[3] As the government evidently concedes, petitioners' return to China is affirmatively prohibited because they are at risk of torture. Pet. for Cert. at 7.

individuals from detention would violate the separation of powers. In particular, the government asserted that granting habeas relief to aliens who had never been admitted would confer a judicially-ordered entry into our country over the objection of the political branches. The government specifically attempted to distinguish the Court's earlier decision in *Zadvydas* on the ground that it addressed only aliens who previously had been lawfully admitted and then lost their right to remain. *See Zadvydas*, 533 U.S. at 693. *See also* Brief for the Petitioners [United States] at 20, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878), 2004 WL 1080689.

In contrast, the aliens in *Martinez*, the government argued, could not be released because they (like the petitioners here) had *never been admitted*. Brief for the Petitioners [United States] at 20, *Martinez* (No. 03-878), 2004 WL 1080689. The government insisted that a judicial order of release would pose grave separation-of-powers and national security concerns:

> That constitutional distinction [between aliens admitted by our government and those stopped at the border] rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-powers considerations in this sensitive area where foreign policy and national security intersect.
>
> * * *
>
> [W]hen the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the

> United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never . . . even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches."

Id. at 19-20 (citing cases) (emphasis added).[4]

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[4] *See also* Brief for the Petitioners [United States] at 16-17, *Martinez* (No 03-878), 2004 WL 1080689 (citations omitted):

> The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. Indeed, the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," is not only "inherent in sovereignty," but also "essential to self-preservation." That power is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." The power to exclude is a legislative and an "inherent executive" power. Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments

This Court necessarily rejected the government's reasoning when it held in *Martinez* that inadmissible aliens stopped at our border and denied entry must be released (subject to permissible conditions of supervision) if their detention becomes unlawful. *See* 543 U.S. at 378, 386-87.[5] The Court's decision ordering release from detention – and thus parole into the country over the government's vehement objection – compels rejection of the district court's erroneous conclusion that the Court's immigration jurisprudence prohibits granting meaningful judicial relief in this case.

The district court's other reason for rejecting immigration parole was the stated concern that doing so would have "national security and diplomatic implications" beyond its authority. In *Martinez* this Court also necessarily rejected that contention when it ordered petitioners' release over the identical objection that releasing inadmissible aliens "stopped at the border" would compromise our national security. *See* Brief for the Petitioners [United States] at 37-

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> largely immune from judicial control."
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> * * *
>
> The political Branches' comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States[ ]

The government's brief in *Martinez* relied on the same cases that the district court cited below. *Compare* Pet. App. 10a (citing *Fong Yue Ting v United States, Knauff v. Shaughnessy* and *Fiallo v Bell*) *with* Brief for the Petitioners [United States] at 15-17, *Martinez* (No. 03-878), 2004 WL 1080689 (citing same).

[5] *Martinez* arose in the context of Mariel Cubans who had physically been paroled, but the holding governs *all* "inadmissible" aliens, including specifically aliens detained at the border who have never been physically present in the territory of the United States at all.

40, *Martinez* (No. 03-878), 2004 WL 1080689.[6] Indeed, in one notable respect, the release ordered under *Martinez* has broader implications than providing relief to these petitioners. The *Martinez* ruling applies to all inadmissible aliens, including all who unilaterally come to our shores without authorization and whose arrival is entirely outside the control of our government. In this case, by contrast, the petitioners include only those who were brought to our territory by the government, who have never sought to enter

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[6] The government vigorously argued that judicially-compelled release of inadmissible aliens would have dire constitutional, safety, security and diplomatic consequences:

> Moreover, adopting what would be, for all practical purposes, a time limit on the physical exclusion of aliens would have significant foreign policy and security implications for the United States – areas into which the judiciary should be loath to tread (if at all) without the clearest direction from Congress and the Executive Branch. Any diminution in the political Branches' comprehensive control over the borders, the admission of aliens, and the management of international migration crises would render the Nation more vulnerable to manipulation and infiltration by hostile powers and would tie the government's hands in responding to humanitarian emergencies.
>
> * * *
>
> It is difficult to understate the damage that could occur to the United States' international relations and national security if the government does not speak with one voice in the handling of migration crises at the border, or if foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens stopped at the border.

Brief for the Petitioners [United States] at 39, 41, *Martinez* (No. 03-878), 2004 WL 1080689.

or to be admitted to the United States, and who are now seeking parole only under judicial and executive supervision. In short, a judicial order of release (with appropriate conditions) pursuant to a finding of unlawful detention would apply only to a limited number of cases and to far fewer aliens than those already governed by *Martinez* and the unknown number who will be covered in the future.[7]

Finally, review is warranted to correct the district court's seeming belief that bringing petitioners to the District of Columbia as a remedy for their unlawful detention would *ipso facto* compel their release into the community. Pet. App. 10a. In fact, the habeas remedy would address petitioners' *current* unlawful detention by the Executive and would not in itself preclude application of other relevant immigration or criminal statutes governing admission, detention and release. In this case, the conclusive Combatant Status Review Tribunal determination that petitioners are *not* enemy combatants would appear to establish that the concerns of dangerousness or terrorism that animated the district court's decision are absent. But even if that were not the case, a court providing relief in this habeas action would

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[7] In *Martinez*, the government estimated that more than 1,000 aliens would apparently gain release if the Court rejected the government's position and that a total of approximately 4,020 aliens were then in the pipeline to benefit from a favorable ruling. See Brief of Petitioner [United States] at 8 & n.5, *Martinez* (No. 03-878), 2004 WL 1080689. Court decisions implementing *Martinez* indicate that judicial release orders are proceeding unremarkably. *See, e.g., Morales-Fernandez v INS*, 418 F.3d 1116, 1124 (10th Cir. 2005) (holding that *Martinez* "dictates that Mr. Morales-Fernandez be released and paroled into the United States"); *Tran v Gonzales* 411 F. Supp. 2d 658, 660 (W.D. La. Jan. 22, 2006) (ordering petitioner's release from detention "under an order of supervision on conditions that the government believes are appropriate under the circumstances").

not thereby be abrogating other statutory authority the government might possess.[8]

2. *The Habeas Corpus Statute Authorizes the Judiciary to Provide Meaningful Relief for Unlawful Detention.*

The district court's failure to grant relief also contravenes the duty imposed by 28 U.S.C. § 2243, namely that the court "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The court expressly concluded that "justice requires" granting relief, but believed itself without legal authority to do so. Pet. App. 6a. Although the district court correctly looked to 28 U.S.C. § 2243 in determining the scope of relief appropriate here, the court misapprehended the statute's significance by construing it as a limit on its ability to fashion a remedy in the circumstances of this case. In fact, § 2243 provides a court with flexibility to fashion appropriate

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[8] Insofar as other statutes may authorize exclusion or even detention of inadmissible aliens and parolees, the government could presumably invoke them if they were applicable to these petitioners in the future. As the Court noted in *Martinez*, other provisions of law may authorize detention of an inadmissible alien and parolee "who presents a national security threat or has been involved in terrorist activities." 543 U.S. at 727 n.8 (quoting USA PATRIOT Act of 2001, § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226a(a)(6))). Furthermore, any alien entitled to release under the immigration detention statute can be subjected to conditions of supervised release and to criminal penalties – including further detention – for failure to comply. *See id* at 387-88 (O'Connor, J., concurring). *See also Zadvydas*, 533 U.S. at 695 (in ordering release "[w]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions"). In any case, it appears that the government has not articulated any such concerns here and that the petitioners requested a hearing before the district court to provide any necessary assurances in this regard.

relief under circumstances where it concludes that outright release may not be feasible or warranted. In this case, the court failed to take the measures necessary to achieve that purpose.

Section 2243 and its antecedents were enacted to give habeas courts greater flexibility to fashion appropriate remedies where immediate release was not appropriate or practicable – not to authorize denial of relief altogether. In construing a predecessor statute containing nearly identical language, this Court explained that the provision "invested [the courts] with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus." *In re Bonner*, 151 U.S. 242, 261 (1894). *See also Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (stating that under § 2243, "a court has broad discretion in conditioning a judgment granting habeas relief"); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (explaining that § 2243's "mandate is broad with respect to the relief that may be granted").

Accordingly, the Court has held that a habeas court may delay the release of a successful petitioner in order to provide the government with "an opportunity to correct the constitutional violation found by the court." *Hilton*, 481 U.S. at 775. In other words, if the error is of a kind that may be corrected without release, a court may allow the government an opportunity to correct the violation. *See, e.g.*, *Mahler v. Eby*, 264 U.S. 32, 46 (1924) (directing that petitioners not be released until the government had a reasonable time in which to correct the defect).

But that is plainly not the case here. The district found that release was warranted but declined to fashion any remedy. This is a case where the violation is not susceptible to correction, and release is therefore the norm. *See In re Bonner*, 151 U.S. at 262 (where "no correction can be made

of the judgment, . . . the prisoner must then be entirely discharged").

Section 2243 reflects a congressional directive that courts sitting in habeas make every effort to provide some appropriate remedy to those whose liberty is unlawfully restrained. The statute cannot be read to authorize a complete denial of relief to one who has been found to be detained unlawfully. Notably, the courts have deemed habeas competent to address claims that would result only in a small "quantum change in the level of custody." *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991) (Posner, J.) (discussing array of habeas relief as encompassing "outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation"), *cited with approval in Wilkinson v. Dotson*, 544 U.S. 74, 125 S. Ct. 1242, 1250 (2005) (Scalia, J., concurring).

Under § 2243, once the district court found that the petitioners were being detained in violation of law, the court was obligated to fashion some appropriate remedy or, at a minimum, to direct the government to consider and propose alternatives to correct the violation within a reasonable time. Thus, even if the district court were justified in hesitating to impose a specific remedial course immediately, *certiorari* should be granted because the court erred in failing to take even the modest step of ordering conditional release and requiring the government to offer conceivable alternatives for implementing the court's directive.

3. *Denial of Relief for Unlawful Detention Eviscerates the Core Protection Guaranteed by the Writ of Habeas Corpus.*

Most fundamentally, review is warranted because the district court's decision eviscerates the most essential

protection of the Great Writ of Habeas Corpus, a judicial remedy for unlawful executive detention. Habeas corpus, enshrined in our Constitution from England, is the core protection against illegal detention by the Executive. The very purpose of the writ would be negated if the Executive engaging in unlawful detention were capable of imposing forms of incarceration that render the Judiciary powerless to grant relief from custody. That would have the effect of debilitating the Suspension Clause and would make the Executive, rather than the Judiciary, supreme in matters of detention.

This Court has repeatedly and recently emphasized that the writ's protections are at their greatest when the custody concerns *executive* detention. "[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). *See also Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring). *See generally Rasul v. Bush*, 542 U.S. 466, 474 (2004).

The English writ that the Framers inherited embodied protections against procedural devices deployed by the Executive to impede the efficacy of the writ. *See* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 144 (1952). In his renowned article, Professor Chafee recounts the evolution of the writ in England and its incorporation into our Constitution. Among the central safeguards enacted by the British Parliament in 1687, and already embodied into the writ at the time of the Constitution, were the protections against the Crown undermining the practical capacity of the Judiciary to enforce the writ. In particular, Chafee explains that *Jenckes' Case*, 6 How. St. Tr. 1189 (1676), led to a series of reforms intended by Parliament to overcome failures by the Judiciary

to effectuate the right to a habeas hearing and to order actual release. *See* 32 B.U. L. Rev. at 148-50.

Chafee details that among the tactics of the custodians at that time was "sending prisoners to the Channel Islands and to army garrisons" as a means of thwarting release. *See id.*, at 150. That and other practical problems caused Parliament to act. Chafee explains the Parliament's response: "These evils did not call for a new formulation of liberty of the person – that had been well done years before. . . . The real trouble was with the procedure available to vindicate that liberty. Yet it was not necessary to create entirely new machinery – the common-law writ of habeas corpus was good when it worked. What was needed was to tighten up and sharpen the machinery all down the line, and the Habeas Corpus Act did just that." *Id.* at 150. Thus, Chafee continues, Parliament enacted a restriction for "*every possible hitch* in the proceedings Parliament could foresee." *Id* at 152 (emphasis added). Included among these was a "list of places outside England to which English prisoners must not be sent." *Id.*

These reforms and many others were codified in our habeas corpus statute, now at 28 U.S.C. § 2241, and secured by the Suspension Clause. They underscore that an effective judicial remedy for unlawful detention is the cornerstone of habeas corpus. The district court's failure in this case to grant any relief for petitioners' detention after finding it unlawful is at odds with that history and purpose. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (noting that the writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty"). *See also Fay v. Noia*, 372 U.S. 391, 401-02 (1963) (function of habeas writ has been "to provide a prompt and efficacious remedy for whatever society deems to be

intolerable restraints"); *Ex parte Milligan*, 71 U.S. 2, 116 (1866) (Davis, J.) ("[i]t was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him").

This case presents a new version of the tactics that historically have been – and legally must be – rejected for the writ to serve as the central guarantor of human liberty and the rule of law. The government seized and transported the petitioners to Guantanamo, the government detained them pending an adjudication by the Combatant Status Review Tribunal, and the government now refuses to find any alternative to their present incarceration or to release them – because they are at Guantanamo. In other words, the Executive has created the very circumstances that it now insists preclude petitioners' release or any remedy whatsoever. At a bare minimum, the district court was obliged to do more than it did and to order some relief. If its failure to do so is permitted, the Executive will possess the ultimate trump in any similar habeas proceeding where the custodian can construct conditions of incarceration so restrictive or byzantine that they can later be invoked as constituting practical or legal impediments to a judicial remedy.

Today, as before, "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). The value of the writ lies in commanding the government to provide a legal accounting in court and a remedy if the confinement is unlawful:

> [T]he glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, *Commentaries on the Laws of England* * 133 (emphasis added). The district court erred by failing to comply with that mandate.

CONCLUSION

For the reasons set forth above, amicus respectfully submits that the petition for writ of *certiorari* before judgment should be granted.

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In The Supreme Court of the United States

ABU BAKKER QASSIM, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF MORE THAN 300 DETAINEES INCARCERATED AT U.S. NAVAL STATION, GUANTÁNAMO BAY, CUBA IN SUPPORT OF PETITION

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CASES

Brown v. *Allen*, 344 U.S. 443 (1953) 3

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 3

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 5

Ex parte Quirin, 317 U.S. 1 (1942) 5

Ex parte Watkins, 28 U.S. 193 (1830) 3

Fay v. *Noia*, 372 U.S. 391 (1963) 4

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 4, 6

Harris v. *Nelson*, 394 U.S. 286 (1969) 2, 5

Hutto v. *Davis*, 454 U.S. 370 (1982) 2

In re Guantanamo Bay Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) 7

In re Yamashita, 327 U.S. 1 (1946) 5

INS v. *St. Cyr*, 533 U.S. 289 (2001) 4

Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 6

Mistretta v. *United States*, 488 U.S. 361 (1989) 5

O.K. v. *Bush*, No. 04-1136 (D.D.C. July 12, 2005) 14

Rasul v. *Bush*, 542 U.S. 466 (2004) ..... *passim*

United States v. *Nixon*, 418 U.S. 683 (1974) 4

Weeks v. *United States*, 232 U.S. 383 (1914) 4

Wilkinson v. *Austin*, 125 S.Ct. 2384, No. 04-495 (March 3, 2005) 16

Zadvydas v. *Davis*, 533 U.S. 678 (2001) 5

TABLE OF AUTHORITIES – Continued

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STATUTES

28 U.S.C. § 2241 *et seq.* 3, 6

OTHER MATERIALS

Abdulrahman Fakhri, *US Censoring Letters Written by Children*, GULF DAILY NEWS, Apr. 18, 2005 15

Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense (Nov. 27, 2002), *reprinted in* THE TORTURE PAPERS, 237 (Karen J. Greenberg et al. eds., 2005) 12

Amnesty International, *Guantánamo: Lives Torn Apart – The Impact of Indefinite Detention on Detainees and their Families* (Feb. 6, 2006) 15, 17

Andrew Selsky, *Varied Tales Emerge from Guantanamo Files*, ASSOCIATED PRESS, Mar. 4, 2006 8

Brief for the Guantanamo Detainees at 5-7, *Al Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir. June 10, 2005) 15

Carol D. Leonnig and Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantánamo*, WASH. POST, Feb. 10, 2005, at A01 14

Carol D. Leonnig, *Further Detainee Abuse Alleged at Guantánamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A01 ..... 13, 14

TABLE OF AUTHORITIES – Continued

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Carol D. Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A1 7

Dana Priest and Dan Eggen, *Terror Suspect Alleges Torture*, WASH. POST, Jan. 6, 2005, at A01 13

Decl. of Dr. John S. Edmondson, *Almurbati, et al.* v. *Bush*, No. 02-1227 (D.D.C. Nov. 16, 2005) 19

Decl. of Thomas Wilner, *Al Odah* v. *United States*, No. 02-0828 (D.D.C. Oct. 24, 2005) 17

Department of Defense, Reprocessed Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents (Mar. 3, 2006), http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html 7, 8

Don Van Natta, Jr., *Questioning Terror Suspects In a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1 ..... 18, 19

Drew Brown, *FBI Blasts Interrogators; Memo indicates detainees were clad in Israeli flags and shown porn under strobe lights*, HOUSTON CHRON., Feb. 24, 2006, at A15 15

Eric Schmitt and Tim Golden, *Force-Feeding at Guantánamo Is Now Acknowledged*, N.Y. TIMES, Feb. 22, 2006, at A6 18

Frontline: Son of Al Qaeda (PBS television broadcast, Apr. 11, 2004) 9

Jane Mayer, *The Experiment*, THE NEW YORKER, July 11 & 18, 2005 ..... 12, 14, 15

TABLE OF AUTHORITIES – Continued

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John Mintz, *Most at Guantanamo to Be Freed or Sent Home, Officer Says*, WASH. POST, Oct. 6, 2004, at A16 9

Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASH. POST., July 28, 2005, at A18 15

Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, Jan. 6, 2005, at A1 13

Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall University School of Law (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf 9, 10

Mark Huband, *US Officer Predicts Guantanamo Releases*, FIN. TIMES, Oct. 5, 2004, at 12 8

Mass Guantánamo Suicide Protest, BBC NEWS, Jan. 25, 2005, http://news.bbc.co.uk/2/hi/americas/4204027.stm 19

Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, at A1 14

Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11 14

Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 ..... 11, 12, 16

Neil A. Lewis, *U.S. Eroding Inmates' Trust at Cuba Base, Lawyers Say*, N.Y. TIMES, Mar. 8, 2005, at A18 11

TABLE OF AUTHORITIES – Continued

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Paisley Dodds, *Guantánamo Protest: 23 tried suicide*, PHILA. INQUIRER, Jan. 25, 2005, at A02 13

Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), *reprinted in* THE TORTURE PAPERS, 340-43 (Karen J. Greenberg et al. eds., 2005) 12

Physicians for Human Rights, *Break Them Down, Systematic Use of Psychological Torture by U.S. Forces* (2005) 14, 16, 18

Red Cross Confirms Guantánamo Hunger Strike, REUTERS, Oct. 7, 2005 18

Report: Video Shows Gitmo Abuse (CBS News television broadcast Feb. 1, 2005) 13

Samara Kalk Derby, *How Expert Gets Detainees to Talk*, THE CAP. TIMES & WIS. ST. JOURNAL, Aug. 16, 2004, at 1A 9

See No Evil, ST. LOUIS POST-DISPATCH, Jul. 15, 2005, at B8 15

Supp. Decl. by Julia Tarver, Esq., *Al Joudi* v. *Bush*, No. 05-0301 (D.D.C. Oct. 14, 2005) 17, 18

This American Life: Episode 310 (NPR radio broadcast Mar. 12, 2005) 19

Tim Golden, *Tough U.S. Steps in Hunger Strike at Camp in Cuba*, N.Y. TIMES, Feb. 9, 2006, at A01 .... 17, 18

Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, Jun. 21, 2004, at A01 9

Tim Golden, *Voices Baffled, Brash, and Irate at Guantanamo*, N.Y. TIMES, Mar. 7, 2005, at A10 8

TABLE OF AUTHORITIES – Continued

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United Nations Commission on Human Rights, *Situation of detainees at Guantánamo Bay*, Feb. 15, 2005 ..... 11, 12, 15, 16

United States Department of State, *Charges of Guantánamo Detainee Torture Unfounded, General Says*, State Dep't Press Releases & Documents, Jul. 14, 2005 11

INTERESTS OF *AMICI CURIAE*[1]

Amicus Murat Kurnaz is a Turkish national, *amici* Ahmed al Darby and Abdullah Ali Saleh Gerab Alsaaei are Saudi nationals, and *amici* Adham Mohammed Ali Awad and Zakaria Al-Baidany are Yemeni nationals who have been detained by the United States at the U.S. Naval Station, Guantánamo Bay, Cuba ("Guantánamo") for years without charge or trial.

The remaining *amici* are more than 300 detainees at Guantánamo who have filed petitions for writs of *habeas corpus* that are pending in the federal courts. *Amici*'s cases are listed in Appendix A.

Collectively, *amici* are gravely concerned that the district court's failure to order the remedy plainly contemplated by this Court in *Rasul* v. *Bush*, 542 U.S. 466 (2004), will perpetuate the system of lawlessness and brutality at Guantánamo that has already driven many *amici* to life-threatening despair.

SUMMARY OF THE ARGUMENT

Nearly two years ago, in *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that individuals imprisoned at Guantánamo could challenge their detention through *habeas corpus* in the federal courts. Petitioners' *habeas* petition is the only case of the over 300 *habeas* petitions filed following *Rasul* to reach a decision on the merits. After the Respondents conceded that Petitioners were "no longer enemy combatants," the district court held that Petitioners' continued detention at Guantánamo was

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[1] In accordance with Rule 37.6, this brief is not authored in whole or part by counsel for any party. No person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Copies of their letters of consent have been lodged with the Clerk.

unlawful. Nonetheless, the district court declared itself impotent to redress this violation of law.

The decision below drains *Rasul* of all meaning and ignores the statutory and constitutional duty of the judiciary to administer justice and check the Executive when acting illegally. Moreover, the district court disregards this Court's manifest concern about the continued detention of innocent men.

This Court's immediate intervention is required. The district court's decision traps *amici* in a system of enforced brutality, which draws no practical distinction between combatant and civilian, or innocent and guilty party. Within this system, the physical and mental health of many *amici* is rapidly deteriorating. The desperation of many *amici* – who now have been informed by a federal court that even those who are innocent and illegally imprisoned can be doomed to infinite confinement – and the imperative to lift the lingering confusion regarding this Court's decision in *Rasul*, which has produced unnecessary and harmful delay since its issuance, call for the Court to grant *certiorari* before judgment.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH *RASUL*.

In *Rasul*, this Court established that federal courts have authority "to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing," and issued a clear mandate to the federal courts "to consider in the first instance the merits of petitioners' claims" challenging their detention at Guantánamo. *Rasul*, 542 U.S. at 484. The lower courts are obligated to follow the mandates of this Court's rulings, especially when adjudicating *habeas* petitions. *See Hutto* v. *Davis*, 454 U.S. 370, 375 (1982); *Harris* v. *Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court, under our constitutional

system, than the careful processing and adjudication of petitioners for writs of *habeas corpus*.").

Yet the district court here only partially complied with the clear mandate of *Rasul*. While the district court recognized its authority to consider Petitioners' *habeas* claims and held that Petitioners' detention at Guantánamo is unlawful, it ultimately thwarted the adjudication of Petitioners' claims – in contravention of *Rasul* – by holding that it had no relief to offer Petitioners. The district court's decision renders this Court's opinion in *Rasul* void of any practical meaning.

A. *Rasul* Clearly Contemplated That The Federal Courts Would Order The Release Of Persons Unlawfully Detained At Guantánamo.

In *Rasul*, this Court confirmed the federal courts' authority to review the legality of Executive detention at Guantánamo pursuant to the federal *habeas* statute, 28 U.S.C. § 2241 *et seq.* By invoking "the historic purpose" of the common law writ of *habeas corpus*, this Court made clear that its decision that the federal courts have *habeas* jurisdiction means that they have the power to order the release of prisoners found to have been confined unlawfully by the Executive. *Rasul*, 542 U.S. at 474 (citing *Brown* v. *Allen*, 344 U.S. 443 (1953)).

It is inconceivable under the common law – and likewise under the *habeas* statute – for a *habeas* court to countenance a prolonged Executive detention it found unlawful. *See Ex parte Watkins*, 28 U.S. 193, 202 (1830) ("habeas corpus is a high prerogative writ, known to the common law, the great object of which is liberation of those who may be imprisoned without sufficient cause"); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (Marshall, C.J.) (concluding that "the crime with which the prisoners stand charged has not been committed," and thereby determining that the Court "can only direct them to be

discharged"); *Fay* v. *Noia*, 372 U.S. 391, 400 (1963) (*habeas corpus* affords a "swift and imperative remedy in all cases of illegal restraint or confinement"). Indeed, the protections of *habeas corpus* are "strongest" in the context of reviewing the legality of Executive detention, *Rasul*, 542 U.S. at 474 (citing *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)), since such detention lacks the safeguards of an antecedent judicial trial. *See also id.* at 488 (Kennedy, J., concurring) (finding that indefinite detention suggests "much greater alignment with the traditional function of habeas corpus").

The district court's refusal to provide redress to Petitioners nullifies the authority granted by this Court to hear the merits of *habeas* petitions filed by detainees at Guantánamo. *See Weeks* v. *United States*, 232 U.S. 383, 393 (1914) (rights are "of no value" where there is no remedy available for violations thereof). The district court acknowledged that the only satisfactory remedy here would be Petitioners' release from Guantánamo, but it decided that it could not order that relief, or any other. Accordingly, Petitioners – and potentially *amici* – are placed in the same position as if this Court in *Rasul* had affirmed the lower courts' dismissal of such *habeas* petitions.

B. The Ruling Below Is Inconsistent With The Core Concept Of Judicial Review.

By failing to remedy Petitioners' unlawful detention, the district court abdicated its constitutional duty to administer justice and to check the unlawful acts of the Executive. *See United States* v. *Nixon*, 418 U.S. 683, 703-05 (1974). As this Court held at the same time it decided *Rasul*, "habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004). This Court in *Rasul* specifically emphasized this judicial role, and rejected the Executive's claim of unilateral decision-making authority,

by recognizing "the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474-75 (reviewing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), *Ex parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946)).

Accordingly, this Court directed the federal courts to proceed to the merits of *habeas* petitions filed by Guantánamo detainees. This Court has held that "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of *habeas corpus*," *Harris*, 394 U.S. at 292, and has recognized that ordering a remedy in cases implicating the Executive's powers to regulate foreign policy "will often call for difficult judgments," *see Zadvydas* v. *Davis*, 533 U.S. 678, 700-01 (2001). Yet, rather than adhere to these principles and accept the challenge of full adjudication, the district court simply wrote the judicial branch out of the constitutional scheme.

The district court's decision not only is clearly erroneous, but also very dangerous in its practical effect. Despite this Court's decision rendered almost two years ago, *amici's* efforts to vindicate their potentially meritorious legal and factual claims have been stymied, as the lower courts' processing of their cases has grown entangled in a legal morass.[2] *Cf. Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) (granting *certiorari* before judgment because issue of constitutionality of sentencing guidelines had "imperative public importance" and was causing "disarray among the Federal District Courts"). This Court should

[2] The fact that Petitioners' appeal is now proceeding before the Court of Appeals does nothing to improve this situation. Any ruling by the Court of Appeals will inevitably be the subject of a challenge here. In the meantime, the cases of the hundreds of *amici* submitting this brief will continue at a standstill as long as it remains undecided whether the federal courts can order the release of unlawfully detained persons.

grant *certiorari* before judgment to resolve the federal courts' apparent confusion about the intended application of *Rasul*.

C. The District Court's Decision Undermines This Court's Manifest Concern About The Continued Imprisonment Of Innocent Men At Guantánamo.

This Court was particularly disturbed in *Rasul* about the plight of detainees who are factually innocent of wrongdoing or wrongly classified as "enemy combatants." Such individuals, this Court wrote, "unquestionably" are entitled to relief under the *habeas* statute:

> Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to ccunsel and without being charged with any wrongdoing – unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'

Rasul, 542 U.S. at 483 n.15 (citing 28 U.S.C. § 2241(c)(3)); *see also id.* at 476 (distinguishing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), on the grounds that Guantánamo prisoners "are not nationals of countries at war with the United States and deny that they have engaged in or plotted acts of aggression against the United States" and "have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing"); *Rasul*, 542 U.S. at 485 (ordering district courts "to consider in the first instance the merits of petitioners' claims" that they are "wholly innocent of wrongdoing"); *Hamdi*, 542 U.S. at 530 (recognizing that the "risk of erroneous deprivation" of liberty through "mistaken military detentions" is "significant").

Petitioners are far from the only innocent non-combatants languishing at Guantánamo. The U.S. military concedes that at least seven other detainees imprisoned at Guantánamo are not "enemy combatants."[3] Moreover, many *amici* believe that any fair review system will show that they too are non-combatants and "wholly innocent of wrongdoing." *Rasul*, 542 U.S. at 484. For example, *amicus* Murat Kurnaz, a 23-year-old Turkish national commencing his fifth year of imprisonment, is detained largely on the claim that his friend "engaged in a suicide bombing" long after Mr. Kurnaz arrived in Guantánamo. *See In re Guantanamo Bay Detainee Cases*, 355 F. Supp. 2d 443, 470 (D.D.C. 2005). Not only is the claim factually preposterous – the friend in question is alive and well and under no suspicion by relevant authorities of committing any such act – but Mr. Kurnaz's complete file also demonstrates that the U.S. military itself recognizes that he has no connections with any terrorist organization.[4]

In addition, cases of mistaken identity are routine at Guantánamo. Detainee 581 was seized from his village in Pakistan and accused of being Abdur Rahman Zahid, a former Taliban deputy foreign minister suspected of murdering Afghans and looting antiquities. But, the detainee said his name was actually Abdur *Sayed* Rahman, not Abdur *Rahman* Zahid, and that he was "only a chicken farmer in Pakistan."[5] There is no evidence or

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[3] Seven of these detainees have *habeas* petitions pending in the federal courts. *See El-Mashad, et al.* v. *Bush*, No. 05-0270 (D.D.C.); *Kiyemba* v. *Bush*, No. 05-1509 (D.D.C.); *Mamet, et al.* v. *Bush*, No. 05-1886 (D.D.C.); *Zakirjan* v. *Bush*, No. 05-2053 (D.D.C.); *Boucetta* v. *Bush*, No. 05-2087 (D.D.C.). All seven of these detainees are *amici* here. *See* Appendix A.

[4] *See* Carol D. Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A1.

[5] Department of Defense, Reprocessed Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents,

(Continued on following page)

suggestion that he engaged in any violent act. Many detainees, like Detainee 919, an Afghan named Faiz, apparently were presented to U.S. forces as a result of local grievances. Faiz testified that he was actually attempting to recover stolen land deeds stolen *from* the Taliban when a local official involved in the land deal accused him of Taliban membership.[6] According to Faiz:

> My hands are farmer's hands, marked by sickles . . . I wasn't a big person. I didn't have that power. You think about it yourself. When [the Taliban] beat us, they took our land. If the Americans hadn't come, they would have killed us all.[7]

Detainee 963, a farmer, was riding a tractor to town to buy motor oil when he pulled over to allow a U.S. convoy to pass. He wore no uniform and had no weapon; yet "[n]ow I am here for two years and nobody knows why." He is not alleged to have engaged in any violent act.[8] For Detainee 339, a Saudi, the allegation against him appears to be that he spent time in a Taliban guesthouse.[9] He was found, as Brigadier General Martin Lucenti has said about the majority of the detainees, running – not fighting.[10]

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http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html (Mar. 3, 2006) [hereinafter "DOD Documents"], Set 3 at 00272-94.

[6] DOD Documents, Set 31 at 2172-81.

[7] *Id.* at 2175.

[8] DOD Documents, Set 27 at 01901-13.

[9] DOD Documents, Set 21 at 01645-88; *see also* Tim Golden, *Voices Baffled, Brash, and Irate at Guantanamo*, N.Y. TIMES, Mar. 7, 2005, at A10 (describing testimony of many Guatánamo detainees recently made public); Andrew Selsky, *Varied Tales Emerge from Guantanamo Files*, ASSOCIATED PRESS, Mar. 4, 2006.

[10] *See* Mark Huband, *US Officer Predicts Guantanamo Releases*, FIN. TIMES, Oct. 5, 2004 (stating that "[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren't fighting. They were running"), *available at* http://news.ft.com/

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U.S. military officials repeatedly have corroborated *amici*'s claims of innocence. A 2002 CIA report concluded that "a substantial number of the detainees appeared to be either low-level militants . . . or simply innocents in the wrong place at the wrong time."[11] An active duty intelligence officer assigned to Guantánamo agreed that "the United States is holding dozens of prisoners at the U.S. Navy Base at Guantanamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a large number of people at Guantanamo who shouldn't be there."[12]

Indeed, a recent, comprehensive analysis of documents released by the Department of Defense reveals in stark statistical terms that a great number of detainees may be incarcerated unjustly at Guantánamo.[13] According to this review, an astounding 86 percent of detainees were arrested and delivered to U.S. custody by Pakistan or the Northern Alliance after the military offered large financial bounties for

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cms/s/192851d2-163b-11d9-b835-00000e2511c8.html; John Mintz, *Most at Guantanamo to Be Freed or Sent Home, Officer Says*, WASH. POST, Oct. 6, 2004, at A16.

[11] *See also* Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, Jun. 21, 2004, at A01 (reporting that "[o]fficials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantanamo was flawed").

[12] Samara Kalk Derby, *How Expert Gets Detainees to Talk*, The Cap. Times & WIS. ST. JOURNAL, Aug. 16, 2004, at 1A; *Frontline: Son of Al Qaeda* (PBS television broadcast, Apr. 11, 2004), transcript, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html (quoting CIA operative who spent a year undercover at Guantanamo as estimating that "there's only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here").

[13] Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall University School of Law (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

the capture of Arab terrorists.[14] The government's own evidence reveals that a vast majority of detainees never participated in any "hostile act" against the United States or its allies, but are detained because of a varyingly loose "association with" one of 72 groups the military has asserted have some unspecified connection to al Qaeda.[15] According to the Department of Defense, only eight percent of detainees are believed to be al Qaeda fighters;[16] many are detained simply because they wore Casio watches or olive drab clothing.[17]

Amici, many of whom believe that they will be able to demonstrate their innocence if provided a fair opportunity to do so, thus share Petitioners' grave concern that the decision below impermissibly perpetuates a system that "allows friends and foes alike to remain in detention." *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

II. THIS COURT'S IMMEDIATE INTERVENTION IS REQUIRED BECAUSE FURTHER DELAY IN IMPLEMENTING *RASUL* THREATENS THE LIVES AND DENIGRATES THE HUMANITY OF MANY DETAINEES AT GUANTÁNAMO.

Amici recognize that, regardless of how deeply misguided the decision below may be, the grant of *certiorari* before judgment is an extraordinary remedy. This, however, is an extraordinary case.

In place of the judicial review promised by *Rasul* nearly two years ago, brutality and lawlessness predominate at Guantánamo. The conditions of confinement and interrogation are designed to produce disorientation and despair among detainees. Among other things, U.S.

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[14] *Id.* at 2-3.

[15] *Id.* at 4, 17.

[16] *Id.*

[17] *Id.* at 20.

military interrogators continually tell many *amici* that the law and lawyers are of no use to them[18] and that they will never be released. The district court's refusal to order the release of Petitioners, who are concededly innocent men, reinforces these lies and will deepen the widespread despair that has already driven hundreds of detainees to life-threatening hunger strikes and repeated suicide attempts.

A. Abusive Conditions And Treatment Have Prevailed At Guantánamo For Over Four Years.

A variety of outside observers, including the International Committee of the Red Cross ("ICRC"),[19] the Federal Bureau of Investigation ("FBI"),[20] and the United Nations ("UN"),[21] have concluded that tactics frequently employed by many personnel at Guantánamo are tantamount to torture and seriously have compromised the health of hundreds of detainees. Techniques officially approved for use at Guantánamo include isolation for up to thirty days; 28-hour interrogations; extreme and prolonged stress

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[18] *See* Neil A. Lewis, *U.S. Eroding Inmates' Trust at Cuba Base, Lawyers Say*, N.Y. TIMES, Mar. 8, 2005, at A18 (reporting that interrogators try to convince detainees not to trust lawyers by telling them that the lawyers are Jews and by posing as lawyers during interrogations).

[19] *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

[20] United States Department of State, *Charges of Guantánamo Detainee Torture Unfounded, General Says*, State Dep't Press Releases & Documents, Jul. 14, 2005, *available at* http://usinfo.state.gov/dhr/Archive/2005/Jul/15-641403.html (reporting that Defense Department investigation into torture at Guantánamo was "a result of more than two-dozen e-mails from FBI personnel alleging mistreatment of detainees in the second half of 2002" and that "the FBI e-mails contained a reference to 'torture techniques' in Guantánamo").

[21] *See also* United Nations Commission on Human Rights, *situation of detainees at Guantánamo Bay*, Feb. 15, 2005, *available at* http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf (hereinafter "UN Report").

positions; sleep deprivation; sensory assault; deprivation of clothing; hooding; and the abusive use of dogs.[22]

The ICRC, whose investigative team spent most of June 2004 at Guantánamo, reported that "investigators had found a system devised to break the will of the prisoners at Guantánamo . . . through 'humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.'"[23] The UN Special Rapporteur on Torture concluded that interrogation techniques used at Guantánamo, "in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. . . . [T]he simultaneous use of these techniques is even more likely to amount to torture."[24] Indeed, government officials acknowledge that psychologists and psychiatrists working in "Behavioral Science Consultation Teams" have conducted a remarkable "experiment" at Guantánamo.[25] According to an "affiliate" of this program, these teams have sought to "reverse-engineer" torture and interrogation techniques that the military trains U.S. forces to withstand, in order to create the "radical uncertainty" necessary to "break" the detainees.[26]

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[22] *See* Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism (Apr. 4, 2003), *reprinted in* THE TORTURE PAPERS at 340-43 (Karen J. Greenberg, et al. eds., 2005); Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense (Nov. 27, 2002), *reprinted in* THE TORTURE PAPERS, *supra*, at 237.

[23] Lewis, *Red Cross*, *supra* note 19.

[24] UN Report, *supra* note 21, at 25.

[25] Jane Mayer, *The Experiment*, THE NEW YORKER, July 11 & 18, 2005, at 63.

[26] *Id.*

Reports show that physical abuse is routine at Guantánamo.[27] For example, FBI documents reveal that agents witnessed: a female interrogator grab the genitals of a detainee and bend his thumbs back; a detainee gagged with his head wrapped in duct tape;[28] a detainee left in isolation for three months in a cell constantly flooded with bright light, who afterwards showed signs of "extreme psychological trauma;"[29] detainees left chained "hand and foot in a fetal position to the floor, with no chair, food or water," for periods of 24 hours or more;[30] and a detainee left in an unventilated interrogation room with no air conditioning with the temperature "well over 100 degrees."[31]

Another procedure used on many "uncooperative prisoners" involves forcing them to strip to their underwear, shackling them hand and foot to a bolt in the floor, and forcing them to endure strobe lights, painfully loud music, and freezing temperatures, for sessions lasting up

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[27] Beatings are the most frequently reported form of mistreatment among Guantánamo detainees, with no less than 45 *amici* and other detainees represented by counsel alleging that they have experienced physical mistreatment. In a report issued by the U.S. Southern Command, video tapes of the activities of the "Immediate Reaction Force," comparable to a riot squad, revealed questions about abuse and misconduct, and included footage of an IRF guard repeatedly pepper spraying a detainee and taunting him, a guard tying a detainee to a gurney for interrogation, and other physical assaults. *Report: Video Shows Gitmo Abuse* (CBS News television broadcast Feb. 1, 2005), *available at* http://www.cbsnews.com/stories/2005/0204/terror/main671682.shtml.

[28] Paisley Dodds, *Guantánamo Protest: 23 tried suicide*, PHILA. INQUIRER, Jan. 25, 2005, at A02.

[29] Dana Priest and Dan Eggen, *Terror Suspect Alleges Torture*, WASH. POST, Jan. 6, 2005, at A01.

[30] Carol D. Leonnig, *Further Detainee Abuse Alleged Guantánamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A01.

[31] Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, Jan. 6, 2005, at A1.

to fourteen hours.[32] Former interrogators at Guantánamo confirm accounts of "inmates being shackled for hours and left to soil themselves while exposed to blaring music."[33]

Sexual provocation, humiliation, and abuse also have been widely reported and in many cases confirmed by the military.[34] A former army intelligence analyst at Guantánamo has revealed that interrogators systematically use sex to unnerve detainees during interrogation.[35] That account has been confirmed in a report by Physician for Human Rights.[36] Detainees allege that they have been threatened with sexual violence for failure to cooperate with interrogation. *O.K.* v. *Bush*, No. 04-1136 (D.D.C. July 12, 2005) (Mem. Op. denying motions for preliminary injunctions).[37] There are reports of interrogators forcing detainees to look at pornographic videos.[38] Recently released FBI memos report that military interrogators "wrapped terrorism suspects in an Israeli flag and forced them to watch homosexual pornography under strobe lights during interrogation sessions that lasted as long as

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[32] Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, at A1.

[33] Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11. Former military guards, intelligence agents, and others at Guantánamo also report that severe sleep deprivation in connection with interrogations is a common practice. Lewis, *Broad Use of Harsh Tactics*, *supra* note 32.

[34] *See* Carol D. Leonnig and Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantánamo*, WASH. POST, Feb. 10, 2005, at A01.

[35] Mayer, *supra* note 25, at 65.

[36] Physicians for Human Rights, *Break Them Down, Systematic Use of Psychological Torture by U.S. Forces* 10 (2005), *available at* http://www.phrusa.org/research/torture/pdf/psych_torture.pdf (hereinafter "Physicians for Human Rights Report").

[37] A number of detainees allege that guards raped several young prisoners in isolated sections of the prison. Leonnig, *Further Detainee Abuse*, *supra* note 30.

[38] Physicians for Human Rights Report, *supra* note 36, at 11.

18 hours."[39] These abuses are precisely the type documented at Abu Ghraib, the U.S. detention facility administered by Army Major General Geoffrey Miller, in an effort to "Gitmo-ize" the now-notorious Iraqi prison.[40]

Conditions of confinement at Guantánamo also maximize isolation and anxiety, further dehumanizing detainees and undermining their ability to withstand interrogation.[41] Detainees are housed in six-by-eight foot cells[42] and are permitted to leave only for interrogation and one hour of outside exercise per week. Brief for the Guantánamo Detainees at 5-7, *Al Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir. June 10, 2005). Detainees are held virtually *incommunicado*, permitted to receive correspondence only from their attorneys and "the occasional, often heavily censored, letters" from family.[43] Even letters from detainees' young children are censored.[44]

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[39] Drew Brown, *FBI Blasts Interrogators; Memo indicates detainees were clad in Israeli flags and shown porn under strobe lights*, HOUSTON CHRON., Feb. 24, 2006, at A15.

[40] *See* Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASH. POST., July 28, 2005, at A18 (reporting that Army Major General Geoffrey D. Miller stated that he wanted to "Gitmo-ize" Abu Ghraib). *See also See No Evil*, ST. LOUIS POST-DISPATCH, July 15, 2005, at B8 (reporting that Maj. Gen. Miller was assigned to Iraq in September 2003, and "that fall, the military began employing Guantánamo tactics on Abu Ghraib prisoners, using sexual humiliation and working dogs in interrogations").

[41] *See* UN Report, *supra* note 21, at 25 (concluding that conditions of detention "seem to have been used to 'counter resistance' and to cause stress. [And, they are] closely linked with investigation techniques").

[42] Mayer, *supra* note 25, at 60.

[43] Amnesty International, *Guantánamo: Lives Torn Apart – The Impact of Indefinite Detention on Detainees and their Families* (Feb. 6, 2006), *available at* http://web.amnesty.org/library/Index/ENGAMR510072006 (hereinafter "Amnesty Report").

[44] Abdulrahman Fakhri, *US Censoring Letters Written by Children*, GULF DAILY NEWS, Apr. 18, 2005.

B. Hunger Strikes And Suicide Attempts Are Widespread At Guantánamo.

The brutal detention and interrogation system at Guantánamo, as well as the chronic legal uncertainty that the district court's decision will only perpetuate, has produced the expected outcome: feelings of total hopelessness and desperation that have driven many detainees to repeated attempts to take their own lives.[45] This system, which has developed in place of law at Guantánamo, is perpetuated by the federal courts' failure to vindicate the rights of detainees – including concededly innocent ones such as Petitioners.

Over two years ago, the ICRC warned that prolonged solitary confinement and indefinite detention at Guantánamo inevitably would compromise the mental health of detainees.[46] When the ICRC visited Guantánamo in June 2004, it found high incidences of mental illness produced by stress, particularly attributable to prolonged solitary confinement and often resulting in "self-harm and suicide attempts."[47] The UN Report also found that "conditions [at Guantánamo] have led in some instances to serious mental illness, over 350 acts of self-harm in 2003 alone, individual and mass suicide attempts and widespread, prolonged hunger strikes."[48]

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[45] Psychologists have long known that "the indeterminacy of prison terms, and the absence of any program leading to release from isolation" can lead to a "pervasive . . . hopelessness," and "deep feelings of despair," causing prisoners to resort to "extreme actions, and desperate solutions." Physicians for Human Rights Report, *supra* note 36, at 65-66 (quoting Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent at 18, *Wilkinson v. Austin*, 125 S.Ct. 2384, No. 04-495 (Mar. 3, 2005)).

[46] Lewis, Red Cross, *supra* note 23.

[47] Physicians for Human Rights Report, *supra* note 36, at 10.

[48] UN Report, *supra* note 21, at 31.

In 2005, many detainees waged prolonged hunger strikes at Guantánamo, and dozens were hospitalized.[49] Through their lawyers, many detainees explained that the hunger strike began in the early summer to demand protection under the Geneva Conventions; adequate food, water and medical care; and respect for the detainees' religious observance. *See, e.g.*, Pls.-Pet'rs Mot. for Prelim. Inj., Ex. E (Decl. of Thomas B. Wilner) ¶ 8, *Al Odah* v. *United States*, No. 02-0828 (D.D.C. Oct. 24, 2005) (documenting statements of Saad Al-Azmi). By August, however, it became clear that the hunger strikers believed their situation was hopeless and were "determined to commit suicide to protest their indefinite confinement."[50] One detainee reported to his lawyer that he had lost all faith in the federal courts to stop his indefinite detention. He vowed to "not eat again until he is released or charged" because "the only control he has at Guantánamo is over what he eats . . . " *See* Wilner Decl. ¶ 6, *Al Odah* (recording comments of Mohammed Al Daihani). Another detainee explained the fatalistic motivation for his hunger strike as follows: "I am dying here every day, mentally and physically. This is happening to all of us. We have been ignored . . . I would rather hurry up a process that is going to happen anyway."[51]

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[49] Amnesty Report, *supra* note 43, at 1.

[50] *See* Tim Golden, *Tough U.S. Steps in Hunger Strike at Camp in Cuba*, N.Y. TIMES, Feb. 9, 2006, at A1.

[51] *See* Amnesty Report, *supra* note 43, at 2. One young detainee (a juvenile when captured) was prompted to eat by promises about improved conditions and release, but reinstated his hunger strike in an act of obvious despair when it became clear that the promises were unfounded. *See* Supp. Decl. by Julia Tarver, Esq., ¶¶ 5-6, *Al Joudi* v. *Bush*, No. 05-0301 (D.D.C. Oct. 14, 2005). The renewed hunger strike and the government's brutal forced-feeding have had appalling consequences for this young man. *Id.* ¶ 7 (noting the "emaciated" Al-Sheri "had lost a disturbing amount of weight," had "difficulty speaking because of lesions in his throat that were a result of the involuntary forced-feeding," and "winced in pain" as he talked). His attorney noted

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While the exact number of detainees affected by the crisis is difficult to confirm, the Government has acknowledged that the hunger strike reached an apex of 130 detainees in the fall of 2005.[52] That number has since declined only after remarkably harsh and painful involuntary feedings.[53] In spite of the government's severe response, hunger strikes at Guantánamo are likely to continue.[54]

Ongoing suicide attempts and incidents of self-inflicted harm are further evidence of the acutely unbearable conditions at Guantánamo.[55] One mental health

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in October that he could no longer walk, had lost some of his vision, and vomited every day. *Id.* ¶ 18. Al-Sheri has provided his attorneys with his last will and testament, fully anticipating that he will die at Guantánamo. *Id.*

[52] *See* Golden, *Tough U.S. Steps*, *supra* note 50 (citing information from chief military spokesman at Guantánamo Lt. Col. Jeremy M. Martin). Detainees have reported higher numbers of participants. *See Red Cross Confirms Guantánamo Hunger Strike*, REUTERS, Oct. 7, 2005 (reporting account that 200 of Guantánamo's 500 detainees were striking).

[53] *See* Golden, *Tough U.S. Steps*, *supra* note 50 (noting that guards have placed hunger strikers "in isolation for extended periods" in "uncomfortably cold isolation cells," have denied detainees blankets and books, and have used "anti-riot control soldiers" to restrain detainees during forced-feedings).

[54] Eric Schmitt and Tim Golden, *Force-Feeding at Guantánamo Is Now Acknowledged*, N.Y. TIMES, Feb. 22, 2006, at A6 (reporting that the military commander responsible for the Guantánamo Bay detention center confirmed that officials have turned to more aggressive methods to deter prisoners who were carrying out long-term hunger strikes); Golden, *Tough U.S. Steps*, *supra* note 50 (noting that Guantánamo "has been beset by hunger strikes almost since it was established in January 2002" and that military officials have acknowledged their use of "involuntary feeding" to quash hunger strikes as early as 2002).

[55] As of March 9, 2003, twenty detainee suicide attempts had been reported. Physicians for Human Rights Report, *supra* note 36, at 52 (citing Don Van Natta, Jr., *Questioning Terror Suspects In a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1). Since then, there have been many more, including a mass suicide attempt in August 2003 in

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expert has noted the "extraordinarily high number" of suicide attempts at the camp as "compared with other prison populations."[56] The case of detainee Jumah al-Dossari, a detainee who has attempted suicide nine times between March 2003 and November 16, 2005, is illustrative. *See* Resp'ts Opp'n to Pet'rs Mot. for TRO and Prelim. Inj., Ex. 2 (Decl. of Dr. John S. Edmondson) ¶ 10, *Almurbati* v. *Bush*, No. 05-1227 (D.D.C. Nov. 16, 2005). The government held Mr. al-Dossari in virtual total isolation from May 2004 until very recently and frequently kept him in uncomfortably cold conditions with fluorescent lights glaring 24 hours a day. *See* Colangelo-Bryan Decl. ¶¶ 27-28, *Almurbati*. In arguing that Mr. al-Dossari was not isolated from human contact, the government offered the absurd defense that he was afforded 29 opportunities to "*interact*" with government interrogators. *See* Resp'ts Opp'n to Pet'rs Mot. for TRO and Prelim. Inj. at 6, *Almurbati*.

Mr. al-Dossari recently hung himself and slashed his arm during a break from visiting with his attorney. *See* Mem. of Law in Supp. for a TRO and Prelim. Inj., Ex. B (Decl. of Joshua Colangelo-Bryan, Esq.) ¶¶ 35-38, *Almurbati* (Nov. 4, 2005). He later explained that he tried to kill himself while his attorney was present because if he died without an outside witness, "nobody would have known what happened."[57]

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which 23 detainees attempted to hang themselves. *Mass Guantánamo Suicide Protest*, BBC NEWS, Jan. 25, 2005 (quoting Army spokesman Lt. Col. Sumpter), http://news.bbc.co.uk/2/hi/americas/4204027.stm. In 2004, alone, the army reported 110 incidents of self-harm by detainees at Guantánamo. *Id.* (quoting Lt. Col. Sumpter and Army Gen. Jay Hood).

[56] Van Natta, *Questioning Terror Suspects*, *supra* note 55 (quoting Dr. Terry Kupers, a psychiatrist who has studied mental health in prisons).

[57] *This American Life: Episode 310* (NPR radio broadcast Mar. 12, 2005), *available at* http://www.thisamericanlife.org (interview with Joshua Colangelo-Bryan).

CONCLUSION

The need for this Court to uphold the rule of law by ordering the implementation of the mandate of *Rasul* is both plain and urgent. *Amici* urge this Court to grant the petition for a writ of *certiorari* before judgment.

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APPENDIX A*

***Kurnaz v. Bush, et al.*,**
04-CV-01135 (ESH)

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* *Amici* are identified by their case docket numbers in the United States District Court for the District of Columbia.

***Zakaria Al-Baidany and Abdel Aziz Al-Swidi v. Bush, et al.*, 05-CV-2380 (CKK); *Adham Mohammed Ali Awad v. Bush, et al.*, 05-CV-2379 (JR)**

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IN THE

Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE UYGHUR AMERICAN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

The question presented is whether the District Court, which had jurisdiction over Petitioners' petitions for habeas corpus and determined that Petitioners' continued military detention was unlawful, had the power to craft a remedy to protect Petitioners' liberty interests from further unlawful deprivation.

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INTRODUCTION

The Uyghur American Association ("UAA") respectfully submit this brief as *amicus curiae* pursuant to Sup. Ct. R. 37.3 in support of Petitioners' application for a writ of certiorari before judgment.[1]

STATEMENT OF INTEREST

East Turkistan has been under the dominion of the People's Republic of China ("PRC" or "China") and referred to by that government as the Xinjiang Uyghur Autonomous Region since 1949. Uyghurs, a largely Muslim people, have long struggled for cultural recognition and self-determination. UAA represents the Uyghur community located in the United States - - a community of people who left their homeland to seek freedom and opportunities unavailable to them in China. UAA works to preserve the rich, humanistic, and diverse Uyghur culture, and to support the Uyghur people's right to use peaceful and democratic means to determine their own political future.

UAA understands that the Petitioners in this case, Guantanamo Bay detainees from East Turkistan, fled China in an effort to reach a relative haven where they could find work and rebuild their lives - - only to be seized and sold to U.S. military authorities. After years of incommunicado detention, the military has determined that Petitioners are not enemy combatants; yet they remain incarcerated thousands of miles from friends and family and without any foreseeable prospect of release. The District Court found that Petitioners' detention was unlawful, but deemed itself incapable of fashioning a remedy. With respect, UAA believes that the District Court erred. A remedy is not only possible, but obligatory.

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[1] The parties consented in writing to UAA's participation in this case, and their consents have been filed with the Clerk of the Court. No party to this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. Sup. Ct. R. 37.6.

UAA is uniquely situated to offer assistance to the Court and the Executive to fashion a remedy. In the District Court, the Uyghur community and UAA members offered to provide housing, food, clothing, English language training, and gainful employment to Petitioners if they are paroled into the continental United States. UAA submits this brief in part to reaffirm that offer.

ARGUMENT SUMMARY

This case is about the liberty of two illegally detained men and the efficacy of the Great Writ. The District Court recognized that the continuing detention of Petitioners is both indefinite and unlawful. *Qassim v. Bush*, 407 F. Supp. 2d 198, 201 (D.D.C. 2005). Nevertheless, it found that, due to constitutional "obstacles" that "involve the separation of powers," it could not offer Petitioners any relief. *Id.* at 202. This conclusion fails to vindicate Petitioners' indisputable liberty interests and, if upheld, will eviscerate the habeas remedy they and the other Guantanamo detainees won less than two years ago in the Supreme Court. *Rasul v. Bush*, 542 U.S. 466, 483 (2004).

Uyghurs have endured decades of mistreatment at the hands of the PRC. Their status as a religious and ethnic minority has exposed them to countless indignities, including the targeted dilution of their culture and the denial of their most basic civil, religious, and political rights. Many Uyghurs have fled China, seeking opportunities to rebuild their lives and communities elsewhere. This case concerns two such Uyghurs - - Abu Bakker Qassim and Adel Abdu' al-Hakim - - men who left their homes and families in search of work and freedom. As the District Court noted, "the government has not stated that [Petitioners] were ever suspected of having engaged in armed conflict against the United States." *Qassim*, 407 F. Supp. 2d at 200. Nevertheless, they were seized and detained as "enemy combatants," and were subsequently transported to Guantanamo Bay, Cuba.

Although the Executive now has determined that it was wrong to label these men "enemy combatants," it refuses to release them. Its principal justification for continued detention is the power to "wind up" Petitioners' captivity in a manner satisfactory to the Executive. The District Court rightly rejected this frightening attempt to justify indefinite, unlawful detention. This Court reached the same result 60 years ago when the government made a similar claim to hold an admittedly loyal U.S. citizen of Japanese descent in an internment camp. *See Ex parte Endo*, 323 U.S. 283, 302-04 (1944).

According to the Executive, even if Petitioners are wrongfully detained, the courts cannot order them released. The Executive will not release them to China because, as Uyghurs, they face the prospect of further detention and torture in China. It will not parole them into the continental United States, because, at bottom, it does not want them in the continental United States, and asserts plenary authority to keep them out. The Executive's solution is to let Petitioners sit at Guantanamo Bay indefinitely until another nation consents to take them.

The District Court's failure to order Petitioners' release guts the habeas relief granted in *Rasul* and diverges from centuries of habeas jurisprudence. The Great Writ is a Judicial check on Executive authority to imprison. The remedy it provides is release. Having determined that Petitioners were and are wrongfully detained, the Writ demands that the courts order their release.

Fortunately, this Court need not craft and implement a remedy on its own. UAA is here to help the court fashion an appropriate solution. UAA and its constituents stand willing to take Petitioners in and to help them meet any conditions of release that may be imposed.

ARGUMENT

I. PETITIONERS ARE NOT ENEMY COMBATANTS.

A. The Uyghur People Have Endured Decades of Discrimination and Brutal Oppression.

Uyghurs have suffered greatly at the hands of the communist government since it came to power in 1949. The State Department annually documents human rights practices in reports that prominently feature the plight of the Uyghur people in China. *See generally Country Reports on Human Rights Practices-2004: China*, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State (Feb. 28, 2005) ("*China Report*").[2] The China Report states that the Uyghur people are subject to increasing, state-sponsored oppression. *Id.* The PRC's conduct reflects an apparent effort to extinguish the Uyghur ethnic, cultural, and religious identity.

The PRC has promoted the steady migration of Han Chinese to East Turkistan on a scale sufficient to dilute the Uyghur majority in the region. The Han population in East Turkistan rose from roughly 300,000 in 1949 to over 8.25 million in 2003, rivaling that of the Uyghur population. In recent decades the Han migration has targeted East Turkistan's capital, Urumqi, where the Han-Uyghur ratio shifted from 20:80 to 80:20. *See id.* at 35.

The steady and calculated Han migration has accompanied a systematic denial of civil, political, and religious freedoms to the native Uyghur population. Economic opportunity is disproportionately distributed along ethnic lines, even to the extent of shipping Han workers to East Turkistan to work on large development projects at the expense of local Uyghur

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[2] These country reports for various countries and years are available on the U.S. State Department worldwide web page at the following address: http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm. Page citations are to the HTML printed version of the report.

labor. *Id.* The China Report notes that "[t]he majority Han Chinese have benefited disproportionately from government programs and economic growth, even in minority areas. Many development programs have disrupted traditional living patterns of minority groups, and have included, in some cases, the forced evacuation of persons." *Id.*

Uyghur participation in the political process is largely illusory and any expression of dissent is potentially dangerous. Ethnic minorities are excluded from positions of real political and economic power; Han officials hold the most powerful Party positions in minority autonomous regions, such as East Turkistan. *Id.* Uyghur political, religious, and economic leaders are targeted for intimidation, incarceration, and execution, based on charges as preposterous as passing "newspaper articles and a list of names of persons whose cases had been handled by the courts." *Id.* at 36. In one of the more recent campaigns to stifle Uyghur dissent, the State Department reported that justice was handed out in the presence of "mass sentencing rallies attended by more than 300,000." *Id.* The PRC is not beyond the forced repatriation and execution of dissenting Uyghurs who have been granted refugee status by the United Nations High Commissioner for Refugees. *Id.*

The Uyghur people are largely Muslim - - a trait that singles them out for further persecution. "Officially sanctioned" mosques are free to operate, *id.* at 21, but "[r]egulations restricting Muslims' religious activity, teaching, and places of worship continued to be implemented forcefully in Xinjiang," *id.* at 23. Religious personnel have been subject to "monthly political study sessions." *Id.* In East Turkistan, mosque building and religious training are restricted, as is the teaching of Islam to children under the age of 18. *Id.* Teachers, professors, and university students are not allowed to practice religion openly. *Id.* at 24. Uyghurs are imprisoned for engaging in non-descript "illegal religious activities," *id.* at 23,

a loose term for any religious activity beyond those sanctioned by the authorities.

Uyghur culture and history are also openly under attack. Cultural promotion and research are plainly frowned upon by the communist authorities, with cultural leaders, researchers, and activists detained and subjected to long prison terms. *Id.* at 36. Uyghur heritage is being erased through such acts as the destruction of books on Uyghur history and culture. *Id.* at 17.

The "war on terror" has emboldened the PRC's assimilation campaign. "Because the Government authorities in Xinjiang regularly grouped together those involved in 'ethnic separatism, illegal religious activities, and violent terrorism,' it was often unclear whether particular raids, detentions, or judicial punishments targeted those peacefully seeking to express their political or religious views or those engaged in violence." *Id.* at 36. "The [Chinese] Government used the international war on terror as a pretext for cracking down harshly on suspected U[y]ghur separatists expressing peaceful political dissent and on independent Muslim religious leaders." *Id.* at 2.

B. Petitioners' Flight from China Earned Them Imprisonment Outside of China at the Hands of United States Authorities.

Petitioners fled oppression in China in search of greater economic opportunity and personal freedom. Their paths crossed in Kyrgyzstan, and together they planned to make their way to Turkey in search of work. July 16, 2005 Sabin Willett Decl. ("July 16, 2005 Willett Decl.") ¶ 6 (Doc. No. 24, Attach. 2).[3] Their journey ended short of its goal in Pakistan, where in late 2001 they were seized and sold to U.S.

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[3] The first citation to papers, pleadings and minutes from the record below are accompanied by a reference to the relevant document number in the District Court docket for *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005).

authorities, apparently for $5,000 each. *Id.* ¶ 7. They spent approximately the next six months in U.S. military custody in Kandahar, Afghanistan. *Id.* ¶ 10.

During their detention in Kandahar, Petitioners learned that they had been inadvertently detained in the confusion associated with U.S. military operations against the Taliban. Mr. Hakim was advised by a U.S. interrogator that "the Americans knew that Mr. Hakim had been seized by mistake." *Id.* Similarly, an interrogator informed Mr. Qassim that "the U.S. was 'there to capture Arabs,' and that Qassim 'was in the wrong place at the wrong time,' and swept up in the 'wrong net.'" Sept. 8, 2005 Sabin Willett Decl. ("Sept. 8, 2005 Willett Decl") ¶ 22 (Doc. No. 35). Half-way around the globe and nearly three years later, the U.S. Combat Status Review Tribunal ("CSRT") process would officially confirm those observations, finding that Mr. Qassim and Mr. Hakim, now long incarcerated in Guantanamo Bay, Cuba, were not enemy combatants. The final step in the CSRT process was completed on March 26, 2005,[4] *see* Aug. 1, 2005 Mot. Hr'g Tr. ("Aug. 1, 2005 Tr.") at 5, but the Executive did not tell Petitioners they were exonerated until two months later. Petitioners' counsel and the District Court did not learn of the CSRT outcome until four months later. July 16, 2005 Willett Decl. ¶¶ 12-14.

Petitioners have endured more than four years of now concededly wrongful captivity in virtual isolation at the hands of the military. Petitioners have almost no contact with their families. UAA understands that Mr. Qassim has had no contact with his wife and three children, including twins he has never seen. *Id.* ¶ 4; Sept. 8, 2005 Willett Decl. ¶ 18. Mr.

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[4] According to public sources, Petitioners may have in fact been initially identified as non-enemy combatants over one year earlier. *See* Mem. in Supp. of Pet'rs Emergency Mot. to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners ("July 20, 2005 Pet'rs Mem.") at 2 (July 20, 2005) (Doc. No. 24, Attach. 1); *see also* Aug. 1, 2005 Tr. at 7.

Hakim also is married with three children, the youngest of whom he too has never met. July 16, 2005 Willett Decl. ¶ 5. After years of incommunicado detention, Mr. Hakim was finally allowed a telephone call with his sister on August 23, 2005. Sept. 27, 2005 Susan Baker Manning Decl. ("Sept. 27, 2005 Manning Decl.") ¶ 4 (Doc. No. 38). At a meeting with counsel, Mr. Hakim was allowed to view photographs of his family, but the photographs could not be left with him and it is unclear whether they were ever released to him. Sept. 8, 2005 Willett Decl. ¶ 12. To UAA's knowledge, Petitioners remain without access to radio, newspapers, magazines or television, except for videos of cartoons and Arabic movies, none of which are in the Uyghur language. *Id.* ¶ 7.

The circumstances under which Petitioners are allowed to discuss their legal status is, at best, intimidating. They have been told by military lawyers as late as October 2005 that the involvement of outside counsel would only make their release more difficult. Dec. 9, 2005 Neil McGaraghan Decl. ("Dec. 9, 2005 McGaraghan Decl.") ¶ 11 (Doc. No. 53). Correspondence between Petitioners and their attorneys has been seized and not delivered. Sept. 8, 2005 Willett Decl. ¶ 7. Face-to-face discussions with their attorneys occur in separate facilities where they are kept in complete isolation. Consultations with counsel - - even by telephone - - are conducted with Petitioners shackled to the floor. Sept. 27, 2005 Manning Decl. ¶ 8.

Petitioners are bombarded with conflicting messages. Suggestions that they will be freed "soon," Sept. 8, 2005 Willett Decl. ¶ 23, and findings of the CSRT that they are not enemy combatants collide with other statements by U.S. military representatives "that they have no more rights that any of the enemy combatants imprisoned at Guantanamo." Dec. 9, 2005 McGaraghan Decl. ¶ 9. Mr. Qassim has expressed concerns about whether the United States is in fact telling potential host countries that he and Mr. Hakim are terrorists. *Id.* ¶ 5.

The military compounded the psychological burdens Petitioners suffer when it permitted PRC interrogators access to Guantanamo, where they threatened both Mr. Qassim and Mr. Hakim. According to Mr. Hakim, the interrogators made comments to the effect that he was "lucky" the Pakistanis turned him over to U.S. authorities and that Guantanamo Bay was far better than the prison that awaited him in China. July 16, 2005 Willett Decl. ¶ 9.

Despite the extreme stress of their seizure and prolonged military detention at Guantanamo Bay, Petitioners remarkably harbor no ill will toward their captors or the United States in general. They never did. Indeed, each expresses support for America. Sept. 8, 2005 Willett Decl. ¶ 17; July 20, 2005 Pet'rs Mem. at 5.

C. Petitioners Remain Prisoners of the United States, Not for the Danger They Pose to the United States, but for the Danger China Poses to Them.

Petitioners cannot go home. We know this from the PRC interrogators who came to Guantanamo Bay, and the Executive acknowledges that torture likely awaits Petitioners if they are released to the government in China. *See, e.g.*, Sept. 8, 2005 Willett Decl., Exs. B & C. The Executive's counsel has made this fact very clear. Aug. 1, 2005 Tr. at 14 ("it's more likely than not that they [Petitioners] will be tortured"). When the District Court obliquely states that "China is keenly interested in [Petitioners'] return," *Qassim*, 407 F. Supp. 2d at 203, the implication is quite dire.

II. PETITIONERS' LIBERTY INTEREST IN FREEDOM FROM UNLAWFUL AND INDEFINITE MILITARY DETENTION IS INDISPUTABLE AND DEMANDS RELEASE.

In *Rasul*, this Court announced that Guantanamo detainees possess the right to challenge their detention through the writ of habeas corpus. *Rasul*, 542 U.S. at 483. Because the Great

Writ exists principally to safeguard individual liberty, it necessarily follows that Guantanamo detainees have individual liberty interests that demand protection. Petitioners invoked the Great Writ to vindicate those interests, and the District Court correctly determined that the government's sole justification for continued detention - - a so-called "wind-up" power - - was both meritless and dangerous.

Unfortunately, the District Court allowed the government to persuade it that other "obstacles" to Petitioners' release left the courts without the power to order a remedy. The District Court erred. The writ is an ancient and flexible mechanism for checking unlawful exertions of government authority, and its equitable nature empowers the courts to do justice in particular cases. Release into the United States, through some form of parole, is the only way for this Court to vindicate Petitioners' liberty interests and to protect the integrity of the habeas remedy. The "obstacles" over which the District Court stumbled are not sufficient to divest the courts of the power to order a remedy.

A. The Great Writ Protects the Right to Be Free from Unlawful Detention.

The writ of habeas corpus provides individuals held in unlawful detention with a procedure to seek their release. 28 U.S.C. § 2241. This has been its core historical function, particularly in times of crisis:

> Habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty .... Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the

> fundamental requirements of the law, the individual is entitled to his immediate release.

Fay v. Noia, 372 U.S. 391, 401 (1963); *see also Rasul*, 542 U.S. at 474.

The right to invoke the writ imparts a corresponding right to be free from unlawful detention. *Fay*, 372 U.S. at 430-31; *INS v. St. Cyr*, 533 U.S. 289, 301-03 (2001). Unlawful detention is detention that is inconsistent with the Constitution, laws and treaties of the United States. *See Rasul*, 542 U.S. at 483 n.15; *see also, e.g., Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (placing limits on detentions in immigration context); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (placing limits on detaining the mentally ill). Because this Court held that Qassim and Al-Hakim have a right to bring a writ of habeas corpus, *see Rasul*, 542 U.S. at 484, they also must possess the right to be free from unlawful detention.[5]

B. The Executive Does Not Have the Power to "Wind Up" Detentions.

As the District Court noted, "[t]he status of 'enemy combatant' has been, until now, the only handhold for the government's claim of executive authority to hold detainees at Guantanamo," under the authority recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Qassim*, 407 F. Supp. 2d at 199. In *Hamdi*, this Court ruled that the Authorization for Use of Military Force ("AUMF"),[6] gives the Executive the

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[5] The right to be free from unlawful detention has been recognized as a core interest in our constitutional framework, *see Foucha*, 504 U.S. at 80, and in international law, *see* International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

[6] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (2001).

power to detain the "limited category" of individuals who it alleges are part of or supporting forces hostile to the United States in Afghanistan and who engaged in armed conflict against the United States as "enemy combatants." *Hamdi*, 542 U.S. at 518-19. As the District Court also recognized, because Petitioners are not enemy combatants, the Executive needs "a new reason" to continue their detention. *Qassim*, 407 F. Supp. 2d at 199.

The government seeks to stretch the authority granted in *Hamdi*, arguing that even if Petitioners are not enemy combatants, they can be held on Guantanamo for as long as it takes the Executive to "wind up" their detention by finding a place to send them that suits the Executive's purposes. In the government's words: "The Executive's power to detain a suspected enemy combatant necessarily includes the authority to wind up that detention in an orderly fashion after a detainee has been determined to no longer be an enemy combatant or after hostilities have ended." Resp't Supplemental Mem. Pursuant to the Court's Invitation at the Aug. 1, 2005 Hr'g ("Aug. 8, 2005 Resp't Mem.") at 13 (Doc. No. 27); *see also Qassim*, 407 F. Supp. 2d at 200. Because the Executive's actions in bringing Petitioners to Guantanamo, wrongly labeling them as enemy combatants and exposing them to the PRC have effectively rendered Petitioners stateless, this amounts to an argument that they can be held indefinitely, as the District Court correctly concluded. *Qassim*, 407 F. Supp. 2d at 201. Of course, neither *Hamdi* nor the AUMF contains such an authorization. On the contrary, the *Hamdi* court reiterated that its opinion authorizing the detention of enemy combatants was strictly limited to its narrow definition of an enemy combatant. 542 U.S. at 509, 516.

The Executive's position recalls one of the darker chapters of our history. Sixty years ago, the government argued that an Executive Order that set up procedures for the internment of "disloyal" U.S. citizens of Japanese ancestry gave it the authority to continue to hold a citizen who concededly was

"loyal" and not otherwise subject to detention in order to resolve "situations created by the exercise of [the original power to detain.]" *Ex parte Endo*, 323 U.S. at 297. The Court disagreed. It refused to read the Executive Order to imply powers beyond those necessary to effect the purpose of the provision, which was to protect against espionage and sabotage: "When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.* at 302. Similarly, here, when the government's power to detain is based on its power to prevent combatants from returning to the battlefield as an exercise of "necessary and appropriate force" in connection with waging war, *Hamdi*, 542 U.S. at 519, detention that has no relationship to that objective is unauthorized, and must be remedied.

C. A Judicial Remedy is Both Available and Required.

The Executive argues that even if the detention is unlawful, the federal courts are powerless to order a remedy. The Executive posits that no court could order Petitioners' release because (1) they may not be "benign," *see* July 29, 2005 Resp't Mem. in Opp'n to Pet'rs Mot. to Vacate Stay Order and Issue Writ Directing Immediate Release of Pet'rs at 9 (Doc. No. 25); (2) release would interfere with ongoing diplomatic efforts to affect a remedy and relocate Petitioners, *see id.* at 5; and (3) release into the continental United States would improperly violate the Executive's plenary control over entry into the United States, *see* Aug. 8, 2005 Resp't Mem. at 3-4, 16-19. None of these justifications is sufficient to prevent a judicial remedy.

The District Court properly rejected the Executive's first justification, calling it "Kafkaesque." *Qassim*, 407 F. Supp. 2d at 200. The Executive cannot spin the CSRT outcome to support its rhetorical notion that, while no longer enemy combatants, Petitioners may once have been such. Petitioners

have *never* been deemed enemy combatants by any appropriate tribunal, much less a court.

The District Court was more troubled by the Executive's second and third arguments, ultimately concluding that they presented constitutional obstacles "and involve the separation of powers doctrine" in a way that precludes a judicial remedy. *Id.* at 202.

The District Court's decision does not uphold separation of powers; it undermines the Judiciary's historic role as protector of individual liberty. Indeed, the District Court's decision would not maintain appropriate separation between coordinate branches of government, but would "*condense* power into a single branch of government." *Hamdi*, 542 U.S. at 536. Just as the Supreme Court in *Hamdi* rejected the government's contention that separation of powers prevents the courts from passing on the facts alleged to support detention of a particular individual as an enemy combatant, this Court should reject the contention that separation of powers prevents the courts from ordering a remedy once the facts show that detention is unlawful. *Id.* at 535-36. As the *Hamdi* court admonished: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536.

The District Court's decision not only misperceives separation of powers, it also undermines the Judiciary's ancient and fundamental power for remedying illegal deprivations of liberty. Petitioners indisputably have the right to challenge their detention by invoking the Great Writ. *Rasul*, 542 U.S. at 483-84. Petitioners invoked that right to seek habeas review, and the District Court ruled that their military detention is unlawful. *Qassim*, 407 F. Supp. 2d at 201. That finding, standing alone, mandates a remedy. The District Court's conclusion to the contrary negated the habeas right

affirmed in *Rasul*, and eliminated the court's ability to check Executive overreaching. This outcome is exactly what this Court warned against in *Hamdi*. *Rasul*, 542 U.S. at 536. The doctrine of separation of powers does not prevent a remedy; on the contrary, it demands that the courts exercise their power to issue a writ for Petitioners' release.

D. Petitioners Should be Paroled into the United States.

The language of the habeas corpus statute reveals the breadth of the power it vests in the federal courts: "The court shall summarily hear and determine the facts, and dispose of the matter *as law and justice require*." 28 U.S.C. § 2243 (emphasis added). The writ "is, at its core an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). Historically, the equitable nature of the writ has allowed courts the flexibility to fashion relief appropriate to the unique facts and circumstances presented by a particular case. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief."); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - - the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."); *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ - - its capacity to reach all manner of illegal detention - - its ability to cut through barriers of form and procedural mazes - - have always been emphasized and jealously guarded by the courts and lawmakers.").

The District Court considered several potential avenues for granting relief to Petitioners, but ultimately concluded that none were available. The District Court erred. The federal judiciary has inherent power to devise an interim remedy in a

case such as this. *It can and should order the conditional* release of Petitioners into the United States pending the ultimate resolution of the government's ongoing diplomatic efforts to gain Petitioners entry into a country other than China.

The federal courts have long recognized the availability of interim relief in habeas cases. *See Baker v. Sard*, 420 F.2d 1342 (D.C. Cir. 1969) (holding that pending its determination on the merits of petitioner's habeas claim, it possessed the inherent power to grant relief *pendente lite*, including conditional release); *see also Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001) ("Absent a clear direction from Congress, federal judicial power is unaltered, and the authority of the federal courts to admit to bail parties properly within their jurisdiction remains unqualified."); *Ostrer v. United States*, 584 F.2d 594, 597 n.1 (2d Cir. 1978) ("The district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody."); *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955) ("One of the inherent powers of the judiciary with regard to proceedings before it has been the admission of a prisoner to bail where, in the exercise of his discretion, the judge deems it advisable.").

The relief Petitioners seek is nothing more than the relief that the Federal Rules of Appellate Procedure and the Rules of the Supreme Court recognize as being presumptively due a successful habeas petitioner pending appeal of the habeas decision. Fed. R. App. P. 23; Sup. Ct. R. 36. In cases where the state or federal detention of a petitioner has been found unlawful by a lower court, these rules recognize a strong presumption that the petitioner will "be released on personal recognizance, with or without surety" pending appeal. Fed. R. App. P. 23(b)(3). In many cases, those entitled to the presumption are individuals who were previously accused and convicted of violent crimes and may not be considered

"entirely benign" by the government or the court. Nevertheless, the rules recognize that once the legal basis for the detention has been removed, the interest of the habeas petitioner in release is substantial. *Hilton*, 481 U.S. at 777-78.

Even in the immigration context, prolonged or indefinite detention of aliens pending the outcome of the administrative, political, or diplomatic efforts that will determine their fate is the exception, not the rule. *Cf. Ma v. Barber*, 357 U.S. 185, 190 (1958) ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted."); *United States ex rel. Picicci v. District Dir. of Immigration & Naturalization at Port of N.Y.*, 181 F.2d 304, 305 (2d Cir. 1950) (granting release where deportation was held in abeyance during the pendency of a private bill in the Senate granting Petitioners the right of admission for permanent residence); *Diaz v. Haig*, 594 F. Supp. 1, 5-9 (D. Wyo. 1981) (noting that the government's ongoing development of a plan for release was "commendable," but holding that alien detainees were entitled to immediate release pending government's determination of their fate). Where legitimate governmental concerns may exist, even the assertion of "plenary" Executive authority cannot justify indefinite detention. *Cf. Zadvydas*, 533 U.S. at 696; *Clark v. Martinez*, 543 U.S. 371, 386 (2005). Rather, the authority to detain has always been and remains subject to a rule of reasonableness, *cf. Zadvydas*, 533 U.S. at 699-700, enforceable through the Great Writ, *Rasul*, 542 U.S. at 484.

Petitioners' detention of more than four years exceeds any notion of reasonableness. *Cf. Zadvydas*, 533 U.S. at 699-700. It would be all the more unreasonable to allow the Executive to escape accountability by invoking its "plenary" powers over diplomacy and immigration given that it is the Executive's overreaching that created Petitioners' predicament. *Cf. United States ex rel. Paktorovics v. Murff*, 260 F.2d 610, 614 (2d Cir. 1958) (executive's conduct conferred on alien rights

that alien would not otherwise have possessed); *Corniel-Rodriguez v. INS*, 532 F.2d 301, 302 (2d Cir. 1976) (ordering entry where alien was made deportable only through executive conduct); *Diaz*, 594 F. Supp. at 6-7 (estopping the government from asserting exclusive authority over aliens and ordering release of aliens to community members).

UAA stands ready and willing to provide whatever assistance the court may require in fashioning and implementing parole. During proceedings before the District Court, members of the Uyghur American community repeatedly offered to provide housing and employment to Petitioners, if they were granted conditional release. *See* Dec. 12, 2005 Status Conference Tr. at 17 ("WILLETT: I can bring into this courtroom resident alien U[y]ghur expatriates who have offered us bedrooms for these men, who have offered us jobs, who have called us on the phone to say how can we help .... We can show you a community of people who can make this work at a practical level ...."); Aug. 25, 2005 Status Conference Tr. at 24 ("WILLETT: Mr. Parhat Yassin (ph), who is in the courtroom today and is a resident asylee U[y]ghur escaped from China himself, and who has called me up to offer his home as a refuge for these people ....").[7] UAA and the Uyghur American community it represents hereby reiterate their offer of assistance and support. UAA understands the plight of Petitioners and is in a unique position to help them meet any conditions of release this Court may choose to impose.

Notably, there is precedent for the use of community resources to remedy unlawful government detention. *Diaz*, 594 F. Supp. at 8-9 (releasing aliens to custody of community members pending government's implementation of a long-

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[7] Mr. Parhat Yassin has a personal connection to Petitioner Al-Hakim. Several members of the Uyghur American community, including Mr. Yassin, were students of Petitioner Al-Hakim's father, a well-respected high school teacher in East Turkistan.

term plan for their future). The availability of such resources in this case is clear, and the need for their use is compelling.

III. THIS COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT

This Court should grant certiorari before judgment because this case is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. This case implicates at least two interests that taken together merit the Court's immediate attention: the indefinite deprivation of the liberty of admittedly wrongfully held individuals, and the concurrent subversion of the habeas remedy this Court recognized in *Rasul*. *Compare Ex parte Quirin*, 317 U.S. 1 (1942) (granting petitions for certiorari filed by accused saboteurs before court of appeals rendered judgment); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 269 (1947) (granting certiorari prior to judgment where prompt resolution of dispute was in the public interest); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (granting certiorari before court of appeals reached merits of dispute to achieve prompt resolution of wartime controversy); *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) (granting certiorari to review directly district court decision dismissing challenge to segregation in public schools "because of the importance of the constitutional questions presented"); *United States v. Nixon*, 418 U.S. 683, 689-90 (1974) (granting cross-petitions for certiorari before judgment in case that implicated core executive powers and the role of the federal courts); *Dames & Moore v. Regan*, 453 U.S. 654, 659-62, 667-68 (1981) (granting certiorari before judgment in court of appeals to address exercise of Executive authority and Judiciary's role in defining limits on that authority); *Mistretta v. United States*, 488 U.S. 361, 371 n.6 (1989) (granting certiorari before judgment because challenge to federal sentencing guidelines was of great importance and because of conflict in lower courts regarding the constitutionality of the system).

As in all of the foregoing cases, this case involves critical issues related to the limits of Executive and Judicial powers in matters of extreme public importance and prominence. It is no exaggeration to say that the world is watching how the United States Judiciary handles the Guantanamo detainees generally, and this case in particular. The Executive has no legitimate basis for continuing to hold Petitioners, and likely never did. After four years of wrongful detention, the efficacy of Petitioners' habeas rights turns as much on the speed with which the courts are able to provide a remedy as on the remedy itself. For this reason, the decision of the Court of Appeals for the District of Columbia Circuit to grant expedited review does not minimize the need for this Court's immediate consideration. Further delay in this case, even the delay associated with allowing the Court of Appeals to hear and pass on this matter, will extend a grave and now quite public injustice that has already gone on too long. This Court should intervene now to ensure that Petitioners' wrongful confinement ends, to uphold the habeas remedy recognized in *Rasul*, and to clarify the roles of the Executive and Judiciary branches in matters of this kind.

CONCLUSION

UAA urges the Court to grant Petitioners' petition for a writ of certiorari before judgment and to issue a writ of habeas corpus releasing Petitioners from their unlawful military captivity.

Respectfully submitted,

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